88-325

No.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1988

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.,
PETITIONERS

v.

MAURICE SMITH, DIRECTOR, ARKANSAS HIGHWAY AND TRANSPORTATION DEPARTMENT, ET AL.,
RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

ANDREW L. FREY
Counsel of Record
MARK I. LEVY
DOUGLAS K. MAYER
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 463-2000

Of Counsel:
WILLIAM S. BUSKER
American Trucking Associations, Inc.

DANIEL R. BARNEY
ROBERT DIGGES, JR.
LAURIE T. BAULIG
ATA Litigation Center
2200 Mill Road
Alexandria, VA 22314-4654
(703) 838-1865
Counsel for Petitioners

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

In *American Trucking Associations, Inc.* v. *Scheiner*, 107 S.Ct. 2829 (1987), this Court held that flat Pennsylvania highway use taxes violated the Commerce Clause because they discriminated against out-of-state truckers. Three days later, the Court vacated a decision of the Arkansas Supreme Court upholding a flat Arkansas highway use tax indistinguishable from the Pennsylvania taxes and remanded for further consideration in light of *Scheiner*. *American Trucking Association, Inc.* v. *Gray*, 107 S.Ct. 3252 (1987). Arkansas nevertheless refused to stop collecting its tax for highway use during the following tax year. On remand, the Arkansas Supreme Court invalidated the tax under *Scheiner* but held that the taxpayers were not entitled to refunds of (a) any taxes illegally levied prior to the decision in *Scheiner* or (b) most of the taxes exacted for highway use during the following tax year.

The questions presented are:

1. Whether this Court's decision in *Scheiner* should be applied retroactively.

2. Whether, even if the decision in *Scheiner* is not retroactive, Arkansas was entitled to collect and ultimately to retain unconstitutional highway taxes for a tax year that did not even begin until after the *Scheiner* decision.

PARTIES TO THE PROCEEDING AND RULE 28.1 STATEMENT

Petitioners are certified plaintiff classes consisting of motor carriers whose vehicles were "subject to the Highway Use Equalization Tax embodied in Act 685 of 1983," in addition to the following named plaintiffs:

Petitioner American Trucking Associations, Inc. (ATA), is an independent corporation that has no subsidiaries or affiliates that are not wholly owned.

Petitioner Arkansas Motor Carriers Association, Inc., formerly the Arkansas Bus & Truck Association, Inc., is an independent corporation that has no subsidiaries or affiliates that are not wholly owned.

Petitioner Leon Cawood is a sole proprietor doing business as Leon Cawood Trucking.

Petitioner Commercial Carriers Inc. is a wholly owned subsidiary of Ryder Commercial Transport, Inc., which is in turn a wholly owned subsidiary of Ryder System, Inc. Commercial Carriers' affiliates or subsidiaries (other than wholly owned subsidiaries) are Automotive Railhandling Inc.; B & C Inc.; Blazer Truck Lines, Inc.; Carrier Support, Inc.; Complete Auto Transit, Inc.; Delevan Industries, Inc.; F. J. Boutell Driveaway Co., Inc.; Fleet Carrier Corporation; Fleet Carrier Dealer Services, Inc.; Janesville Auto Transportation Company; M & G Convoy, Inc.; Murray Sandblast & Paint, Inc.; National Trucking Company; Ryder Energy Distribution Corporation; Ryder Truck Rental, Inc.; Summit Industries, Inc.; and Transport Support, Inc.

Petitioner Diamond Transportation System, Inc., is an independent corporation whose subsidiaries and affiliates (other than wholly-owned subsidiaries) are Fox Transportation, Inc.; Sed. Air, Inc.; and Snicknej Co.

Petitioner Joe Fortenberry is a sole proprietor doing business as Fernwood Transportation.

Petitioner Jones Truck Lines, Inc., which has no affiliates or subsidiaries that are not wholly owned, is a subsidiary of Sun Carriers, Inc.

Petitioner Rollins Leasing Corporation is a wholly owned subsidiary of R.L.C. Corporation. Rollins' affiliates or subsidiaries (other than wholly owned subsidiaries) are Rollins Dedicated Carriage Services, Inc. and Rollins-Matlack Administrative Services, Inc.

Petitioner Transcon Lines, which has no affiliates or subsidiaries that are not wholly owned, is a subsidiary of Transcon, Inc.

Respondents are the following defendant state officials, or their successors—Maurice Smith, Director, Arkansas Highway and Transportation Department (Mr. Smith's predecessor in office, Henry C. Gray, was the lead defendant in the earlier proceedings in this case); Dalton Farmer, Ron Herrod, Patsy Lee Thomasson, Robert Pritchett, Jr., and Bobby Hopper, members of the Arkansas State Highway Commission; John Bailey, Chief of the Arkansas Highway Police Division of the Arkansas Highway and Transportation Department; Charles D. Ragland, Commissioner of Revenues, Revenue Division, Arkansas Department of Finance and Administration; Jimmi Lou Fischer, Treasurer of the State of Arkansas; and Mahlon Martin, Director, Arkansas Department of Finance and Administration—and intervenor-defendants O.K. Enterprises, Inc., Peterson Industries, Inc., and Pilgrim's Pride Corporation, doing business collectively as the Arkansas Poultry Federation.

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RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

American Trucking Associations, Inc., *et al.* (ATA), respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of Arkansas in this case.

OPINIONS

The opinion of the Supreme Court of Arkansas (App. A, *infra*) is reported at 295 Ark. 43, 746 S.W.2d 377. The opinion of Justice Blackmun, in his capacity as Circuit Justice, with respect to interim injunctive relief (App. C, *infra*) is reported at 108 S.Ct. 2. The orders of the Supreme Court of Arkansas denying rehearing (App. B, *infra*), denying interim relief (App. D, *infra*) and denying a remand to Chancery Court for interim relief (App. E, *infra*) are unreported. The order of this Court remanding the prior appeal to the Supreme Court of Arkansas (App. F, *infra*), is reported at 107 S.Ct. 3252.

An opinion of the Supreme Court of Arkansas on a prior appeal (App. G, *infra*) and its supplemental opin-

ion on the denial of rehearing thereof (App. H, *infra*) are reported at 288 Ark. 488, 707 S.W.2d 759, and 288 Ark. 506-A, 709 S.W.2d 410, respectively. The opinion of the Supreme Court of Arkansas affirming the denial of interlocutory relief (App. I, *infra*) is reported at 280 Ark. 258, 657 S.W.2d 207.

JURISDICTION

The judgment of the Supreme Court of Arkansas (App., *infra*, 1a) was rendered on March 14, 1988, and a timely petition for rehearing was denied on April 25, 1988 (App., *infra*, 7a). On July 20, 1988, Justice Blackmun extended the time for filing a petition for a writ of certiorari to and including August 23, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (3).

STATEMENT

1. On June 23, 1987, this Court struck down two Pennsylvania flat highway use taxes as violative of the Commerce Clause of the United States Constitution. *American Trucking Associations, Inc.* v. *Scheiner*, 107 S.Ct. 2829. This case concerns the retroactive and prospective effect of the decision in *Scheiner* on an Arkansas tax materially indistinguishable from one of the invalid Pennsylvania taxes.

The Arkansas Highway Use Equalization (HUE) Tax, Ark. Stat. Ann. §§ 75-817.2, 75-817.3 (Supp. 1985), enacted in 1983 and repealed in October 1987, required heavy trucks operating on Arkansas' highways to pay either an annual flat tax of $175 or a tax of 5¢ per mile traveled in Arkansas. The proceeds—estimated by the Arkansas Supreme Court to be over $160 million during the life of the tax (App., *infra*, 3a)—were dedicated to maintenance of the State's highways.

Under this scheme, Arkansas effectively taxed only the first 3,500 miles of annual highway use by a given vehicle—that being the point at which it became advantageous to pay the flat $175 rate. Any additional high-

way use, though obviously causing the same amount of highway wear and tear, was free of tax. The result of this tax structure was that frequent users of the State's highways paid a substantially lower tax per mile of operations than did less frequent users. Because vehicles based in Arkansas were likely to log many more miles within the State than vehicles based elsewhere, the tax produced a substantial discrimination against interstate commerce in terms of per-mile costs, as the court below acknowledged (App., *infra*, 2a).

The HUE tax was imposed for the privilege of operating during a July 1-June 30 tax year. But because the amount of the tax for carriers having to pay 5¢ per mile was computed on the basis of operations conducted during the previous tax year, carriers were given until August 31 to obtain and display the decal evidencing payment of the HUE tax. According to information provided to ATA by the Arkansas Highway and Transportation Department, approximately $18.5 million was collected during the months of June, July, and August of 1987.

2. In 1983, even before the HUE tax became effective, ATA instituted this class action challenging the tax on the ground that it impermissibly discriminated against interstate commerce in violation of the Commerce Clause. ATA sought prompt injunctive relief *pendente lite*, which was denied by the Arkansas courts (see App. I, *infra*). Thereafter, the Chancery Court of Pulaski County upheld the tax, and a divided Arkansas Supreme Court affirmed (Apps. G and H, *infra*). ATA appealed to this Court under 28 U.S.C. § 1257(2). The Court held the appeal (No. 87-358) pending its decision in ATA's simultaneously filed appeal in *Scheiner* (No. 87-357), which involved an identical constitutional challenge to Pennsylvania's two flat highway use taxes.

On June 23, 1987, this Court ruled that the Pennsylvania taxes violated the Commerce Clause because their measure was not proportionate to the extent of highway use. It noted that the "inevitable effect [of unappor-

tioned flat taxes] is to threaten the free movement of commerce" (107 S.Ct. at 2840), that the Pennsylvania taxes failed the "internal consistency" test for measuring the validity of state taxes challenged under the Commerce Clause (*ibid.*), and that "the taxes are plainly discriminatory" because, "[i]n practical effect, * * * they impose a cost per mile on [out-of-state] trucks that is [many times] as heavy as the cost per mile borne by local trucks" (*id.* at 2841).

On June 26, 1987, this Court vacated the judgment of the Arkansas Supreme Court in this case and remanded for further consideration in light of *Scheiner*. 107 S.Ct. 3252. ATA immediately inquired of Arkansas officials whether they intended to continue to enforce the HUE tax during the pendency of the remand proceedings, and the State responded that it would. In addition, the State refused to accept payments of the tax under protest and declared that, even if the HUE tax were to be held unconstitutional, it intended to assert a defense of sovereign immunity as a complete bar to any refund of those payments. In light of the State's position, ATA moved for immediate issuance of this Court's mandate, pursuant to Rule 52.2, so that it could seek injunctive relief against the HUE tax once the case returned to the Arkansas state courts. Over the State's opposition, Justice Blackmun granted ATA's motion, and the mandate issued on July 16, 1987. See App., *infra*, 10a.

3. That same day, with the Arkansas Supreme Court about to recess for the summer, ATA moved in that court for a remand to the Chancery Court so that it could promptly seek a preliminary injunction either to enjoin further collection of the HUE tax or to order an escrow of the taxes to be collected, pending a decision of the merits. In its application, ATA noted that the failure to act expeditiously would result in the collection of large sums of plainly unconstitutional taxes, which the State had indicated it would in no circumstance refund.

The State opposed the motion for a remand. It urged the Arkansas Supreme Court not to "dispos[e] of the issues in a hasty manner and without complete consideration of the issues raised," notwithstanding the court's impending recess and the fact that July and August were peak months for the payment of HUE taxes (see page 3, *supra*). Nevertheless, the Arkansas Supreme Court denied ATA's motion for a remand on July 20, 1987. App., *infra*, 15a.

On July 24, 1987, in light of the Arkansas Supreme Court's refusal to remand this case to the Chancery Court for further proceedings, ATA asked that court itself to grant injunctive relief in the form of an order requiring HUE tax payments to be escrowed pending a ruling on the constitutionality of the tax. In support of its application, ATA argued that its success on the merits was highly likely due to the substantial identity of the HUE tax and the Pennsylvania axle tax invalidated in *Scheiner*. It further contended that out-of-state truckers operating in Arkansas risked irreparable injury in the absence of temporary equitable relief: if they refused to pay the HUE tax pending a determination of its constitutionality, they would be barred from using the State's highways and would suffer devastating economic losses; on the other hand, if they paid the HUE tax there was a substantial risk, given Arkansas' stated intent to assert sovereign immunity and its refusal to accept HUE tax payments made under protest, that it would be impossible to obtain refunds once the tax was declared unconstitutional.

4. On July 30, 1987, the Arkansas Supreme Court entered an order (without opinion) denying ATA's application for temporary relief. App., *infra*, 14a. ATA thereupon immediately sought emergency injunctive relief from this Court. On August 14, 1987, Justice Blackmun, in his capacity as Circuit Justice, granted ATA's application and ordered that all further HUE tax payments be placed in escrow pending completion of the litigation.

App., *infra*, 13a. Justice Blackmun found that the HUE tax "works to deter interstate commerce" in a manner "substantially similar to that of the Pennsylvania unapportioned flat taxes invalidated in *Scheiner*" and that "ATA is likely to succeed on the merits of its challenge to the Arkansas HUE tax." *Id.* at 11a. Justice Blackmun further concluded that there was a risk of irreparable injury to the carriers represented by ATA, in light of the State's refusal to accept HUE tax payments made under protest and its planned assertion of sovereign immunity as a ground for refusing refunds. *Id.* at 12a.

5. On October 9, 1987, a special session of the Arkansas Legislature repealed the HUE tax and enacted a replacement tax at a rate of 2½ cents per mile, with no ceiling for extensive highway use. 1987 Ark. Acts 3 (Second Extraordinary Sess.). Under the new act, payment of the HUE tax for 1987-88 satisfies the carrier's 1987-88 replacement tax obligation; the effect of this is to perpetuate for another year the advantage given Arkansas-based operators by the flat HUE tax.

6. In an opinion issued on March 14, 1988 (App., *infra*, 1a-6a), the Arkansas Supreme Court decided the remand proceedings. It made short shrift of the question of the constitutionality of the HUE tax under *Scheiner*, striking the statute down and stating that it had "little doubt that the Supreme Court would hold that the HUE tax is unconstitutional" (*id.* at 3a).

The court then considered the question of petitioners' entitlement to refunds of HUE taxes paid during the pendency of the litigation, which it estimated to have been about $159 million up to the time of Justice Blackmun's escrow order and $4.9 million thereafter. Applying the test of *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971), the Arkansas court held that *Scheiner* should not be given retroactive effect.

With respect to the first, or threshold, prong of the *Chevron* test, which is addressed to whether a decision works a sufficient change in the law that reliance on an

opposite rule was justifiable, the court below held that "a reasonable person could easily have found [the HUE tax] to pass Commerce Clause muster" on the basis of decisions of this Court from an earlier era upholding similar taxes (App., *infra*, 4a). With respect to the second prong of that test, which looks to whether retroactive application furthers the purposes of the new rule, the court asserted that prospective application would suffice to achieve the goal of free trade (*ibid.*). Finally, with respect to the third prong, which considers whether retroactive application of the new rule would be inequitable, the court noted that the tax revenues had already been expended and concluded that a full refund "would allow [petitioners] an unconscionable windfall far in excess of a fair recovery for the discrimination they may have suffered due to the tax" (*id.* at 4a-5a).[1]

Accordingly, the Arkansas Supreme Court denied any refund of tax payments for the pre-*Scheiner* period. And although it had acknowledged that the HUE tax was plainly unconstitutional under *Scheiner*, the court also permitted the State to retain most of the moneys collected for the post-*Scheiner* tax year, ordering refunds only of the escrowed funds. It explained this action on the basis that, after the August 14 escrow order, the State was "put on notice that the ATA's claims" were "likely to succeed on their merits" (App., *infra*, 5a). The court also observed (*ibid.*) that the escrowed funds had not been spent or, presumably, counted on for the future. Justice Hickman dissented with respect to the post-*Scheiner*, pre-escrow payments, observing that the ruling erroneously refused to give *Scheiner* even prospective effect (*id.* at 6a).

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[1] The court did not explain why this observation made it equitable to refuse a refund of even the discriminatory portion of the tax. This point was stressed in ATA's rehearing petition to the Arkansas Supreme Court, which argued (at 4-8) that the court's reasoning in this regard did not support a complete denial of refunds.

REASONS FOR GRANTING THE PETITION

This case presents two important questions involving the power of states to collect and retain unconstitutional taxes. The first involves the general and recurring issue of the application of retroactivity doctrine to decisions invalidating state taxes under the Commerce Clause or other provisions of federal law. The second involves the appropriateness of insisting upon prompt and scrupulous enforcement by the states of legal principles announced by this Court. A quick glance at the chronology of relevant events will bring these questions into focus:

- 1935-1950—This Court renders three decisions (the "*Aero Mayflower*" line of cases) sustaining the validity under the Commerce Clause of statutes imposing flat fees on operators of trucks and buses for the privilege of using the highways of the taxing states.[2]

- 1950-1980—Flat highway taxes apparently fall into disuse. (Every flat tax statute mentioned in the *Scheiner* opinion (see 107 S.Ct. at 2841 n.17) was enacted during the 1980s.)

- 1977-1981—A series of cases, including the seminal ruling in *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977), and the subsequent decision in *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609 (1981), lays down the principles of modern Commerce Clause jurisprudence relied on in *Scheiner* to hold that taxes like the HUE tax are unconstitutional.

- 1983—Despite the warnings that *Complete Auto* and *Commonwealth Edison* provided to state lawmakers, Arkansas enacts the HUE tax. Even before the tax goes into effect, petitioners file suit challenging its constitutionality and seeking interim injunctive relief, relying on precisely the same grounds ultimately found in *Scheiner* to invalidate Pennsylvania's virtually identical flat highway tax.

- 1983-1987—The case gradually wends its way through the Arkansas courts to this Court. While this is happening, the State collects well over $100 million in HUE taxes.

- June 23, 1987—*Scheiner* is decided, and a few days later the instant case is remanded to the Supreme Court of Arkansas for reconsideration in light thereof.

- June 23-August 14, 1987—Arkansas announces that it will continue to enforce the HUE tax during the coming tax year, beginning July 1. The Arkansas Supreme Court, at the State's urging, rebuffs ATA's efforts to obtain interim relief or expedited consideration of the constitutionality of the HUE tax, and a substantial proportion of total July 1987-June 1988 HUE taxes are collected during this period.

- August 14, 1987—Justice Blackmun enters an order requiring that all further HUE tax collections be placed in escrow. Two months later, the HUE tax is repealed and replaced.

As this chronology shows, Arkansas paid little heed when it enacted the HUE tax to its duty under the Commerce Clause to avoid discriminatory taxation, and followed up that indifference with a stubborn refusal, rewarded by the Arkansas Supreme Court, to acknowledge the inescapable consequence of *Scheiner* that the HUE tax was invalid.

This conduct is of a piece with a variety of other state legislative actions and judicial decisions reflecting indifference to the unconstitutionality of discriminatory taxes and a steadfast determination to avoid refunds of such taxes after they have been finally invalidated. For instance, Vermont has passed a series of discriminatory truck taxes, putting new ones in place as rapidly as the

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[2] *Aero Mayflower Trans. Co.* v. *Georgia Pub. Serv. Comm'n*, 295 U.S. 285 (1935); *Aero Mayflower Trans. Co.* v. *R.R. Comm'rs*, 332 U.S. 495 (1947); *Capitol Greyhound Lines* v. *Brice*, 339 U.S. 452 (1950).

old ones are struck down,[3] while Florida has done the same with liquor taxes.[4] These legislative tendencies are

[3] In 1986, the Supreme Court of Vermont held invalid a system of entry fees imposed on trucks base-registered outside Vermont. *American Trucking Ass'ns, Inc.* v. *Conway*, 508 A.2d 408, cert. denied, 107 S.Ct. 3262 (1987). That system imposed a $50 truck decal tax, but bestowed a facially discriminatory offset in registration fees on Vermont truckers. And apart from the offset, the $50 flat fee resulted in a lower cost per mile for Vermont truckers precisely parallel to the unconstitutional discrimination produced by the flat rate taxes in *Scheiner* and in this case.

Immediately after the Vermont court's decision, the legislature eliminated the facially discriminatory offset but otherwise reenacted the $50 flat tax. See 1986 (Adj. Sess.) No. 124, amending Vt. Stat. Ann. tit. 23, §§ 415, 3007, 3010. ATA thereafter successfully sought an escrow of the revenues collected under this plainly unconstitutional statute, and its attempt to obtain a refund of taxes paid is now before the Vermont Supreme Court. See *American Trucking Ass'ns, Inc.* v. *Conway*, [Vt.] St. Tax Rep. (CCH) ¶200-306 (Vt. Super. Ct., Washington Co., Feb. 11, 1988), notice of appeal filed, No. 88-156 (Vt. Mar. 11, 1988). The Vermont legislature likewise reenacted with slight amendment a discriminatory $10-per-entry charge. See Vt. Stat. Ann. tit. 23, § 417(a). Again, ATA was forced to obtain an escrow and engage in litigation over an obviously void tax. See *American Trucking Ass'ns, Inc.* v. *Conway*, [Vt.] St. Tax Rep. (CCH) ¶ 200-287 (Vt. Super. Ct., Washington Co., May 4, 1987), notice of appeal filed, No. 87-300 (Vt. June 3, 1987).

[4] Prior to this Court's decision in *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263 (1984), Florida's alcoholic beverage laws granted an excise tax exemption to beverages manufactured and bottled in Florida from Florida products. After *Bacchus*, which invalidated under the Commerce Clause a parallel Hawaii local beverage exemption, the Florida legislature amended the exemption by removing the word "Florida" from the statute, while describing eligibility for favored tax treatment in terms applicable almost exclusively to Florida products. See *McKesson Corp.* v. *Division of Alcoholic Beverages and Tobacco*, 524 So.2d 1000 (Fla. 1988), pet. for cert. pending, No. 88-192 (filed July 30, 1988). After the Florida Supreme Court struck down this statute under the Commerce Clause while denying any refund remedy, the Florida legislature adopted yet another alcoholic beverage excise tax system, which continues to tax beverages produced outside Florida at a rate many times higher than those produced in Florida. See 88-192 Pet. 2, 5, 8-9.

encouraged by the widespread practice of state courts to decline to give retroactive (or, as here, even full prospective) effect to decisions striking down state taxes on federal constitutional grounds,[5] or to invoke sovereign immunity as a basis for refusing refunds.[6]

This case provides an excellent vehicle for this Court to give guidance to legislatures, state courts, and taxpayers regarding the proper analysis of non-retroactivity principles in the context of state taxes that violate the Commerce Clause or other provisions of federal law.

I. THE ISSUE OF THE RETROACTIVITY OF *SCHEINER* TYPIFIES IMPORTANT AND RECURRING QUESTIONS OF COMMERCE CLAUSE JURISPRUDENCE

In recent years Commerce Clause challenges to state tax statutes have been a staple of this Court's docket, with the frequent result that state taxes have been struck down on the ground that they discriminated impermissibly against out-of-state taxpayers or activities.[7] These

[5] See, *e.g.*, *McKesson Corp.*, *supra*; *National Can Corp.* v. *Department of Revenue*, 749 P.2d 1286 (Wash.), appeal dism'd and cert. denied, 108 S.Ct. 2030 (1988); *Ashland Oil, Inc.* v. *Rose*, 350 S.E.2d 531 (W. Va. 1986), appeal dism'd for lack of jurisdiction, 107 S.Ct. 1949 (1987); *Salorio* v. *Glaser*, 461 A.2d 1100 (N.J.), cert. denied, 464 U.S. 993 (1983).

[6] See *American Trucking Associations, Inc.* v. *Conway*, 508 A.2d 408, cert. denied, 107 S.Ct. 3262 (1987); *Continental Trailways, Inc.* v. *Director, Div. of Motor Vehicles*, 509 A.2d 769 (N.J. 1986), cert. dism'd per stipulation, 107 S.Ct. 1636 (1987); *Private Truck Council of America, Inc.* v. *Secretary of State*, 503 A.2d 214 (Me.), cert. denied, 476 U.S. 1129 (1986).

[7] In addition to *Scheiner*, see, *e.g.*, *New Energy Co.* v. *Limbach*, 108 S.Ct. 1803 (1988); *Tyler Pipe Indus.* v. *Washington Dep't of Revenue*, 107 S.Ct. 2810 (1987); *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263 (1984); *Armco Inc.* v. *Hardesty*, 467 U.S. 638 (1984); *Westinghouse Elec. Corp.* v. *Tully*, 466 U.S. 388 (1984); see also *Exxon Corp.* v. *Hunt*, 475 U.S. 355 (1986) (state tax preempted by federal statute); *Williams* v. *Vermont*, 472 U.S. 14 (1985) (state tax invalid under Privileges and Immunities Clause); *Metropolitan*

decisions enforce a core purpose of the Commerce Clause to encourage free trade among the states by protecting against the strong incentive that each state has to shift the costs of local government to outsiders.[8] There is every reason to suppose that challenges to the validity of state taxes under federal law will remain an important part of this Court's docket in the future.[9]

Naturally enough, if a tax is found to be invalid, the question is likely to arise whether past payments of such a tax must be refunded. This Court has itself acknowl-

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Life Ins. Co. v. *Ward*, 470 U.S. 869 (1985) (same under Equal Protection Clause); *ASARCO, Inc.* v. *Idaho State Tax Comm'n*, 458 U.S. 307 (1982) (same under Due Process Clause). See generally *Mobil Oil Corp.* v. *Commissioner of Taxes*, 445 U.S. 425, 443 (1980) ("The effect of the Commerce Clause on state taxation of interstate commerce is a frequently litigated subject that appears to be undergoing a revival of sorts.") (footnote omitted).

[8] See, *e.g.*, *McGoldrick* v. *Berwind-White Co.*, 309 U.S. 33, 46 n.2 (1940) (discussing the "recognized danger that, to the extent that the burden falls on economic interests without the state, it is not likely to be alleviated by those political restraints which are normally exerted on legislation where it affects adversely interests within the state"); *Nippert* v. *Richmond*, 327 U.S. 416, 434-435 (1946) ("Provincial interests and local political power are at their maximum weight in bringing about acceptance of this type of legislation. With the forces behind it, this is the very kind of barrier the commerce clause was put in the fundamental law to guard against"); *United States* v. *County of Fresno*, 429 U.S. 452, 458-459 (1977); R. Posner, *Economic Analysis of Law* 602 (3d ed. 1986); L. Tribe, *American Constitutional Law* § 6-5 at 411 (2d ed. 1988).

[9] Seven state tax cases await decision by this Court in the coming term. *Amerada Hess Corp.* v. *Director, Div. of Taxation*, Nos. 87-453, 87-464; *Goldberg* v. *Sweet*, Nos. 87-826, 87-1101; *Shell Oil Co.* v. *Iowa Dep't of Revenue*, No. 87-984; *Davis* v. *Michigan Dep't of Treasury*, No. 87-1020; *Texas Monthly Inc.* v. *Bullock*, No. 87-1245; *Allegheny Pittsburgh Coal Co.* v. *County Comm'r*, Nos. 87-1303, 87-1310; *Cotton Petroleum Corp.* v. *New Mexico*, No. 87-1327. Although several of these cases involve challenges based on provisions of federal law other than the Commerce Clause, invalidation of a tax on any federal law ground will likely give rise to remedial issues that parallel those raised by this case.

edged this issue on various occasions, but it has not, in declaring a tax unconstitutional, undertaken to decide at the same time whether its rulings should be applied retroactively. Rather, recognizing that "the federal constitutional issues involved may well be intertwined with, or their consideration obviated by, issues of state law" (*Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263, 276-277 (1984)), the Court has left decision of the retroactivity issue to the state courts in the first instance. See, *e.g.*, *Scheiner*, 107 S.Ct. at 2847-2848; *Tyler Pipe Indus.* v. *Washington Dep't of Revenue*, 107 S.Ct. 2810, 2822-2823 (1987).

Perhaps not surprisingly, state courts have almost uniformly resolved that issue in favor of their state treasuries by holding that, as a matter of federal law, decisions invalidating state taxes under the Commerce Clause are limited to prospective application. See note 5, *supra*. As a result, out-of-state companies that were unconstitutionally taxed have been denied any remedy, and a climate has been fostered in which states feel free to legislate and to administer their tax laws without taking due care to avoid violations of federal law.

This growing line of state court decisions reflects a systemic problem of substantial public importance that warrants this Court's review. See Tatarowicz, *Right to a Refund for Unconstitutionally Discriminatory State Taxes and Other Controversial State Tax Issues Under the Commerce Clause*, 41 Tax Lawyer 103, 118 (1987). Narrowly conceived, the question presented is whether these decisions have faithfully applied the Court's retroactivity analysis in *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971). More broadly, however, what is at stake is whether the Commerce Clause principle of nondiscrimination will be frustrated in practice by the actions of state legislators and judges that sacrifice the interests of interstate commerce for those of the state fisc and in-state taxpayers. The inherent pressures for states to impose an unfair share of the tax burden on out-of-state busi-

nesses, which the Court has struggled to restrain in its substantive decisions under the Commerce Clause, must also be guarded against in a proper retroactivity analysis. Indeed, insofar as the Tax Injunction Act (28 U.S.C. § 1341) restricts taxpayers' access to United States district courts, this Court is the only federal tribunal that can pass on the retroactivity issue.

The issue of the retroactivity of Commerce Clause decisions invalidating state taxes has not only substantial jurisprudential significance, but also unusually great practical, dollars-and-cents importance because of the amounts of money that such taxes typically raise. The retroactivity of *Scheiner* alone is being litigated in five states and involves claims for restitution of several hundred million dollars in unconstitutional flat highway taxes.[10] Thus, the business community and state tax authorities have an enormous practical need for guidance from this Court.

Moreover, as we next show in discussing the application of the three *Chevron* factors, this case typifies many of the problems that are likely to arise when considering whether state tax invalidations should be limited to prospective effect; it therefore offers the Court an excellent opportunity to provide guidance of broad utility to future litigants.[11]

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[10] In addition to Arkansas and Pennsylvania, refund litigation is also pending in Kentucky, New Jersey, and Vermont.

[11] A related retroactivity issue is presented by the petition in *McKesson Corp.*, *supra*, No. 88-192. The question there is whether the Florida Supreme Court correctly limited to prospective application its decision invalidating a discriminatory state tax under the principles of *Bacchus*, *supra*. Because the retroactivity question in *McKesson* involves a decision on "an issue of first impression" rather than an "overruling * * * [of] past precedent" under *Chevron* (404 U.S. at 106), it is a natural complement to the question presented here.

In *National Can Corp.* v. *Washington Dep't of Revenue*, appeal dism'd for want of jurisdiction and cert. denied, 108 S.Ct. 2030 (1988), three Justices voted to grant review on the question of the retroactivity of *Tyler Pipe*, which had invalidated an exemption contained in Washington's B&O tax. As discussed in text, the present case is for several reasons a far better vehicle for review of the retroactivity issue than was *National Can*.

1. The Foreseeability Of The *Scheiner* Decision

It is a general principle of long standing that the rule of law announced by a judicial decision normally has retroactive effect. See, *e.g.*, *Saint Francis College* v. *Al-Khazraji*, 107 S.Ct. 2022, 2025 (1987); *United States* v. *Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801). In a narrow range of circumstances, however, this Court has held that some decisions establishing a "new" rule of law should not be applied retroactively to later cases in which the operative facts arose before the date of the decision setting forth the new rule. The governing test for non-retroactivity in civil cases is stated in *Chevron*, 404 U.S. at 106-107. See *Griffith* v. *Kentucky*, 107 S.Ct. 708, 713 n.8 (1987). Under *Chevron*, "[t]he presumption [is] strongly in favor of retroactive application." *EEOC* v. *Vucitech*, 842 F.2d 936, 942 (7th Cir. 1988).

For a decision to have only prospective effect, it first "must establish a new principle of law" (*Chevron*, 404 U.S. at 106). In cases like *Scheiner* that involve the continued vitality of earlier rulings, this requirement means that the decision must "overrul[e] clear past precedent on which litigants may have relied" (*ibid.*). As this Court has explained, this "'clear break' principle * * * [is a] threshold test for determining whether or not a decision should be applied nonretroactively." *United States* v. *Johnson*, 457 U.S. 537, 549 n.12 (1982). The rationale for this element of the *Chevron* test is readily apparent: it is meant to identify those instances in which retroactive application of a new principle would upset settled and justifiable expectations, for only then might the normally overriding societal interest in applying the correct rule of law be outweighed.

When this Court decided *Scheiner*, it declined to apply the old *Aero Mayflower* line of cases, which it characterized as embodying an outmoded analysis that had been thoroughly discredited in modern Commerce Clause jurisprudence, most notably the 1977 ruling in *Complete Auto*.[12] At the time of the *Scheiner* decision, a total of seven states, including Pennsylvania and Arkansas, imposed one form or another of discriminatory flat highway tax on trucks; every one of these was enacted well after the decision in *Complete Auto*. See *Scheiner*, 107 S.Ct. at 2841 & n.17.

Had Arkansas and her sister states given due consideration to the constitutionality of these new taxes when they enacted them, they would have seen that they presented serious problems under the Commerce Clause. On the one hand, the attributes of these taxes—that they lacked a fair relation to the extent of highway use within the taxing state and were bound to lead to actual and substantial discrimination in favor of local truckers and against interstate operators—made them highly suspect under the principles of *Complete Auto* and the 1981 decision in *Commonwealth Edison* (see *Scheiner*, 107 S.Ct. at 2844). On the other hand, the *Aero Mayflower* line of cases had upheld similar taxes 40 years earlier and had never been formally overruled.

These circumstances pose a paradigmatic question: who should bear the risk of loss associated with enactment of a constitutionally dubious state tax law, the taxpayer or the state? We think the Supreme Court of New

[12] *Scheiner* disposed of the *Aero Mayflower* cases as relics of "the pre-*Spector* era" (107 S.Ct. at 2833, citing *Spector Motor Service, Inc.* v. *O'Connor*, 340 U.S. 602 (1951), which was overruled in *Complete Auto*). Noting that "recent decisions * * * have rejected th[e] somewhat metaphysical approach to the Commerce Clause" represented by *Spector* (*id.* at 2846), the Court stated that the *Complete Auto* analysis had "*necessarily called into question the future vitality* of [the *Aero Mayflower* cases] that had upheld facially neutral flat taxes" (*ibid.*; emphasis added).

Jersey got it right in *Exxon Corp.* v. *Hunt*, 534 A.2d 1, 8 (1978):

> The purpose of the *Chevron* test is the avoidance of prejudice arising from judicial decisions that interested parties could not fairly have anticipated. In this case the issue of statutory interpretation was susceptible to either of two resolutions, one advanced by the State and the other advanced by the plaintiffs. The [United States Supreme] Court's holding that CERCLA partially preempted the Spill Act was not sufficiently unpredictable to satisfy this aspect of the *Chevron* criteria.

The court below took precisely the opposite view: a state's reliance on an erroneous forecast about the validity of a problematical tax should be deemed justified if "a reasonable person could easily have found [the tax] to pass Commerce Clause muster * * *" (App., *infra*, 4a). And the Supreme Court of Florida in the *McKesson* case suggested, in a similar vein, that collection of such a tax is justified by the presumptive validity of any tax enacted by the legislature. See 88-192 Pet. App. 21a.[13]

It is important for this Court to consider whether such lax standards for satisfying *Chevron*'s threshold test are

[13] Whether the situation involves putative reliance upon questionable but not yet overruled old cases, as here, or upon arguably tenable but not yet approved approaches, as in *Exxon* and *McKesson*, the underlying question must be the same: does the ruling of unconstitutionality upset reasonable expectations upon which the state justifiably relied?

This case is in this respect a far cry from *National Can*, *supra*. The multiple activities exemption to the Washington B&O tax invalidated in *Tyler Pipe* was enacted in 1950 and had been upheld by this Court (as well as by the Washington courts) on several occasions, including as recently as 1983, when the taxpayer's appeal in *Chicago Bridge & Iron Co.* v. *Washington Dep't of Revenue* was dismissed for want of a substantial federal question (464 U.S. 1013). In that situation, the reasonableness of Washington's enactment of the multiple activities exemption could not possibly be questioned, and the State accordingly had a strong claim of justifiable reliance on this Court's continued and recent decisions upholding its tax.

appropriate. Certainly they are not easy to square with prior explanations of the test offered by this Court. Prospective-only application requires a "'clear break'" (*Johnson*, 457 U.S. at 549 n.12) with "clear past precedent" (*Chevron*, 404 U.S. at 106) on which a party was "entitled to rely" (*Saint Francis College*, 107 S.Ct. at 2025). The threshold was crossed in *Chevron* because the shortened statute of limitations adopted by the nonretroactive case "was quite unforeseeable" (404 U.S. at 108).[14] Here, by contrast, it was quite likely that the Court would hold flat highway taxes incompatible with the requirements of the Commerce Clause, as construed in *Complete Auto* and *Commonwealth Edison*.

The state courts' allocation of risk of error in cases involving unconstitutional state taxes is also dramatically at odds with the treatment of the closely related problem of municipal liability under 42 U.S.C. § 1983. In *Owen* v. *City of Independence*, 445 U.S. 622 (1980), the Court recognized that awards of monetary relief against municipalities for constitutional violations would not only "create an incentive for officials who may harbor doubts about the lawfulness of their intended actions to err on the side of protecting citizens' constitutional rights" (*id.* at 651-652), but also would "allocate any resulting financial loss to the inevitable costs of government borne by all the taxpayers, * * * [rather than] solely by those whose rights, albeit newly recognized, have been violated" (*id.* at 655).

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[14] See also *Pembaur* v. *City of Cincinnati*, 475 U.S. 469, 488 (1986) (Stevens, J., concurring) (retroactivity is appropriate for any decision that was "presaged in * * * well-established precedent"); *id.* at 494 (Powell, J., dissenting) (retroactivity is not justified when "the decision had not been foreshadowed"); *Carter* v. *City of Chattanooga*, No. 84-5247 (6th Cir. June 27, 1988) (en banc), slip op. 7 ("a new rule of law [should not be] impose[d] on parties who had no significant reason to doubt the availability or constitutionality of a statute or practice"); Tatarowicz, *supra*, 41 Tax Lawyer at 141.

The Court's reasoning in *Owen* applies equally to the prospectivity issue in Commerce Clause cases. Unless a decision is a clear and unforeseeable break with past law, retroactive application is appropriate to encourage state officials to give due weight to interests of national free trade when those interests clash with parochial local concerns and to reallocate the financial consequences of unconstitutional discrimination from out-of-state taxpayers to the state's broader tax base. If there existed a substantial possibility that a state tax would be invalidated under federal law—that is, if the issue was fairly "susceptible to either of two resolutions" (*Exxon Corp.*, 534 A.2d at 8)—the state should not be permitted to avoid the usual legal obligation to return money unconstitutionally collected (see *Carpenter* v. *Shaw*, 280 U.S. 363 (1930); *Ward* v. *Love County*, 253 U.S. 17 (1920)) by claiming justifiable reliance upon an erroneous assessment of the validity of the tax.

2. Retroactive Application And Commerce Clause Policies

The second *Chevron* factor is whether retroactive application "will further or retard [the policies underlying] * * * the rule in question" (404 U.S. at 107)—here, the protection of free trade among the states and the avoidance of discrimination against interstate commerce. The Arkansas Supreme Court, quoting *National Can*, found it "'difficult to understand how retroactive application would encourage free trade among the states since whatever chill was imposed on interstate trade is in the past'" (App., *infra*, 4a). Such reasoning, if correct here, would always be true in Commerce Clause cases; the theory that the Commerce Clause is indifferent to a state's retention of unconstitutional taxes is a categorial ground in favor of non-retroactivity—and one that requires close scrutiny by this Court.[15]

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[15] There are critical differences in this respect between the instant case and *National Can*. In *National Can*, the flaw in the tax was "the risk of multiple taxation" arising from the failure to meet

In fact, here and in many other state tax contexts, retroactivity will promote Commerce Clause values in two ways. See Tatarowicz, 41 Tax Lawyer at 119, 141-142. First, limiting *Scheiner* to prospective application would do nothing to remedy the unconstitutional discrimination against out-of-state taxpayers that has already occurred. The unfair burden that was placed on out-of-state truckers, and the resulting competitive benefit to Arkansas-based truckers, would go unredressed. Likewise, every tax dollar unlawfully exacted would remain in the State's coffers, so that the State would have succeeded for five years in shifting an unfair share of its tax burden to outsiders. We therefore see little basis for doubting that Commerce Clause interests would be advanced by righting the competitive scales between in-state and out-of-state truckers.

Second, and perhaps more important, denial of retroactive application to cases like *Scheiner* surely jeopardizes the constitutional interest in preventing future violations of the Commerce Clause by removing the incentives state legislators otherwise would have to avoid discriminatory taxation of interstate commerce. See *Nippert* v. *Richmond*, 327 U.S. 416, 434 (1946) ("[t]he problem comes down therefore to whether the state or municipal legislative bodies in framing their tax measures to reach interstate commerce shall be at pains to do so in a manner which avoids the evils forbidden by the commerce clause").

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the requirement of internal consistency, and an acceptable cure was the provision of a credit for taxes paid to other states. See *Tyler Pipe*, 107 S.Ct. at 2820. But because few if any taxpayers were actually subject to multiple taxation, the plaintiffs would have paid virtually the same amount of tax even under a constitutional version of the tax. See *National Can*, 749 P.2d at 1292. A grant of refunds in that circumstance would truly involve a windfall. By contrast, in this case there is a "conceded" (App., *infra*, 2a) disparity of more than 3:1 in the tax burdens of in-state and out-of-state truckers; thus, petitioners undeniably paid tens of millions of dollars more than they would have under a nondiscriminatory tax.

Under the decision below, non-retroactivity will be the norm rather than the infrequent exception. In that situation, any impulse state legislators have to enact constitutionally questionable taxes that favor in-state over out-of-state taxpayers will be reinforced by the knowledge that such preferences would be not only politically advantageous but economically cost-free. See notes 3, 4 & 8, *supra*, and accompanying text.

In *Owen* v. *City of Independence*, 445 U.S. at 651-652, the Court noted that monetary relief "serve[s] as a deterrent against future constitutional deprivations" and provides an "incentive" for government officials "to err on the side of" complying with the Constitution. "Indeed, a decisionmaker would be derelict in his duties if, at some point, he did not consider whether his decision comports with constitutional mandates and did not weigh the risk that a violation might result in an award of damages from the public treasury" (*id.* at 656). The same analysis is applicable here. Such an incentive structure is especially appropriate in this area, given the powerful political pressures to discriminate against out-of-state taxpayers and the fact that the monetary relief at issue is simply restitution of taxes that were unconstitutionally obtained. Accordingly, Commerce Clause policies clearly support the retroactivity of *Scheiner*.

3. Equitable Considerations

The final *Chevron* factor is whether retroactive application would produce " 'substantial inequitable results' " (404 U.S. at 107). Here again, the mode of analysis employed by the court below and by other courts that refuse to give retroactive application to decisions invalidating state taxes under federal law is deeply troubling and represents a clear road map to the routine denial of monetary restitution to victims of unconstitutional taxation.

The Arkansas Supreme Court relied on two factors—first, that the tax moneys had been expended for the benefit of the public, including petitioners; second, that

award of a full refund would give petitioners "an unconscionable windfall" because it would exceed the amount of any discriminatory injury they suffered. App., *infra*, 5a. Both of these assertions embody a peculiar and, we submit, unacceptable construction of the equity factor.

It is far from clear why the fact that the unconstitutional tax proceeds have been "spent" or "counted on for the future" (App., *infra*, 5a) should defeat retroactivity. Surely the fact that an unconstitutional fine or civil penalty had been spent by the state while its validity was being litigated would never justify a refusal to refund it. No explanation is offered why taxes should be different, especially when the defect in the tax is actual, unlawful discrimination that causes a disfavored class of taxpayers to pay more than their share while a favored group pays less. And even if refunding the ill-gotten tax revenues would be *burdensome* for the state, which the court below did not find, it hardly follows that requiring it to do so would be *inequitable*.

The defect in the court's reasoning is especially clear where, as here, the tax in question is a user fee rather than a general revenue measure. In this case, maintenance of the State's highways—an objective that out-of-state truckers desire no less than in-state truckers—can be fully funded by other, nondiscriminatory highway taxes imposed on all truckers, including petitioners, in fair proportion to the wear and tear they actually cause to the State's roads. See *Scheiner*, 107 S.Ct. at 2847 & n.27. And so can refunds. Ultimately, not one cent of the refunds need come from the pockets of the State or its non-trucker taxpayers; rather, they can be financed by new taxes, fairly shared by in-state and out-of-state truckers.

The second "equitable" consideration adduced by the court below—that a full refund would confer a "windfall" for petitioners "far in excess of a fair recovery for the discrimination they may have suffered due to the tax"

(App., *infra*, 5a)—is especially pernicious. To begin with, the court's premise is utterly unfounded. As Justice Blackmun noted in granting the escrow, the out-of-state truckers paid more than three times as much tax per mile as the Arkansas-based truckers did (*id.* at 11a). Accordingly, the "discrimination component" of the HUE tax payments represented more than two-thirds of the total, and full refunds would exceed only slightly the amount of actual injury. The situation is thus wholly unlike in *National Can*, where the taxpayers could invoke little more than a theoretical risk of discrimination. See note 15, *supra*.

But even if full refunds would result in a significant windfall, any problem that entails cannot be laid at petitioners' door. They simply invoked the remedy provided by Arkansas law for an illegally exacted tax, which is a refund. See *City of Little Rock* v. *Cash*, 277 Ark. 494, 513, 644 S.W.2d 229, 237 (1982), cert. denied, 462 U.S. 1111 (1983); *Streight* v. *Ragland*, 280 Ark. 206, 209 n.6, 655 S.W.2d 459, 461 n.6 (1983). Certainly, the assertion that a full refund would include a windfall component wholly fails to justify the denial of any relief whatever.

Petitioners do not argue that federal law requires a refund of the total HUE tax paid. Indeed, in response to the court's reasoning, petitioners urged—to no avail—that the court should at least order refunds equalling the excess payments due to the unlawful discrimination. Pet. for Rehearing 7-8. In that way out-of-state taxpayers would be charged their fair share, but no more, for their "use[] [of the] Arkansas highways" (App., *infra*, 4a).

The Arkansas Supreme Court's reasoning also raises the prospect of increased judicial intrusion into state taxing systems. Insofar as payment of unconstitutional taxes into a state treasury weighs against retroactivity, courts will be more likely to award preliminary injunctive relief restraining the collection or at least the expenditure of the tax, in order to preserve a refund rem-

edy if the taxpayer prevails. *See Ohio Oil Co.* v. *Conway*, 279 U.S. 813 (1929). In fact, Justice Blackman entered just such an injunction in the case (though too late to protect most of petitioners' tax payments). Furthermore, absent the prospect of a refund remedy, state law arguably would no longer provide a "plain, speedy and efficient remedy" (28 U.S.C. § 1341), freeing federal courts from the constraint of the Tax Injunction Act. These consequences could prove more injurious to the states than the requirement to refund unconstitutional taxes that were of dubious provenance when enacted. Injunctions or even escrow orders could leave revenue needs unmet and might thereby force a state's abandonment of a challenged tax whose constitutionality might ultimately have been sustained.

II. ARKANSAS WAS NOT ENTITLED TO CONTINUE TO COLLECT THE HUE TAX IN DISREGARD OF ITS PLAIN INVALIDITY UNDER THIS COURT'S DECISION IN *SCHEINER*

Even if the court below were correct in ruling that *Scheiner* embodied a new principle of law that ought properly be denied retroactive application, there can be no justification—and the Arkansas Supreme Court tendered none—for the refusal to give *prospective* effect to *Scheiner* with respect to Arkansas' efforts to exact the tax for highway use during the tax year that began *after* the date of the *Scheiner* decision.[16] The decision below conflicts in this respect with the ruling by the highest court of Maryland in *American Trucking Associations,*

[16] Some payments for the tax year beginning July 1, 1987, were made before the date of the *Scheiner* decision, but most were made after that date. We believe that the duty to give *Scheiner* prospective effect relates to both categories of payments and turns on when the transactions being taxed—use of Arkansas' highways—took place. It might be argued, alternatively, that pre-*Scheiner* payments for the post-*Scheiner* tax year should be covered by a non-retroactivity ruling. Which of those views is correct has little bearing on the present issue—whether Arkansas' refusal to give prompt effect to *Scheiner* should be reviewed by this Court.

Inc. v. *Goldstein*, 541 A.2d 955 (1988) (see pages 28-29, *infra*). This Court should review whether Arkansas was justified in refusing to give prompt implementation to the constitutional principles set forth by *Scheiner.*

ATA's appeal of the decision of the Arkansas Supreme Court upholding the constitutionality of the HUE tax was held by this Court pending the decision in ATA's simultaneously filed appeal in *Scheiner*; three days after *Scheiner* was decided, the judgment in this case was vacated and the case remanded for reconsideration in light of *Scheiner.* See *American Trucking Associations, Inc.* v. *Gray*, 107 S.Ct. 3252 (1987). At that time, Arkansas was in the process of collecting HUE tax payments for the tax year beginning on July 1, 1987 (eight days *after* the *Scheiner* decision). While truckers subject to the HUE tax were given until August 31, 1987, to display decals evidencing payment for the 1987-88 tax year, the logistics of obtaining the decals, distributing them to far-flung fleets, and affixing each decal to its proper vehicle are sufficiently time-consuming that a substantial part of the approximately $30 million in annual HUE tax payments was paid between the time of the *Scheiner* decision and mid-August, when Justice Blackmun ordered all further HUE tax collections escrowed. 108 S.Ct. 2 (1987).

That the HUE tax was doomed by *Scheiner* is beyond serious dispute, since it was materially indistinguishable from the Pennsylvania axle tax invalidated in that case. Pennsylvania's tax was assessed at a rate of 9¢ per mile up to a maximum flat rate of $180 (2,000 miles); Arkansas' HUE tax rate was 5¢ per mile up to a maximum flat rate of $175 (3,500 miles). Both taxes violated the internal consistency principle that was at the heart of the *Scheiner* decision, since their replication by other states would inevitably cause interstate truckers to suffer far heavier tax burdens for the same level of highway use than would be experienced by truckers who operated largely or exclusively within Pennsylvania or within

Arkansas. Moreover, both taxes were shown to have actual discriminatory impact, costing typical out-of-state truckers many times as much per mile of operation within the State as they cost in-state truckers. Compare 107 S.Ct. at 2841 with App., *infra*, 11a.

What was Arkansas' response to the decision in *Scheiner* and the remand in *Gray* and to petitioners' efforts to obtain a speedy end to the plainly invalid HUE tax? Justice Blackmun described it in his August 14 order requiring that HUE tax collections be escrowed (App., *infra*, 12a):

> Arkansas officials have expressed their intention to continue collecting the HUE taxes during the pendency of the case and have refused to accept payment of the taxes "under protest." Motor carriers operating interstate must pay the annual HUE tax by August 31. If motor carriers refuse to pay the tax pending a determination of its constitutionality, they will be barred from the State's highways and will suffer substantial economic losses. On the other hand, if motor carriers pay the tax, there is a substantial risk that they will not be able to obtain a refund if the tax ultimately is declared unconstitutional. Applicants assert [and respondents have not denied] * * * that the Arkansas Highway Department has informed them that, should the tax be invalidated, the State will assert immunity from any subsequent refund order.

As for the Arkansas Supreme Court, it denied petitioners' motion to remand to the Chancery Court so that prompt relief could be sought there, denied a motion requesting that it order an escrow pending decision in the case, and went home for the summer (see App., *infra*, 10a). When, in March 1988, the Arkansas Supreme Court finally did address the remanded case, it candidly acknowledged that, in light of *Scheiner*, there was "little doubt that the Supreme Court would hold that the HUE tax is unconstitutional." App., *infra*, 3a.

Nevertheless, the court permitted the State to retain the bulk of the unconstitutional taxes collected for the

1987-88 post-*Scheiner* tax year, granting refunds only of the considerably smaller amounts that were paid after the escrow was established. The latter date was said to be the time "when the [State was] put on notice that the ATA's claims were ones which were likely to succeed on the merits" (App., *infra*, 5a). It seems quite evident that, had Justice Blackmun not issued an escrow order, the Arkansas Supreme Court would have permitted the State to retain all taxes collected until the date it finally got around to issuing its own opinion applying *Scheiner* to the HUE tax.

Assuming for present purposes that the court below was correct in holding that *Scheiner* should not be given retroactive effect (but see Point I, *supra*), that hardly justifies the radically different result of permitting the State to exact and retain the plainly invalid HUE tax for highway use during the year *after* the decision in *Scheiner*.[17] That part of the Arkansas Supreme Court's ruling amounts to nothing short of a refusal to give *prospective* effect to *Scheiner*. This was recognized by Justice Hickman in dissent below, who stated that "[i]f the United States Supreme Court's decision in * * * *Scheiner* * * * is to be applied prospectively, then the refund should be made from the date of that decision, or certainly no later than when we were asked, in July 1987, to place the funds in escrow." App., *infra*, 6a.

It is well settled that a new principle of law, if nonretroactive, is effective on the date that the decision announcing it is "handed down." *Shea* v. *Louisiana*, 470 U.S. 51, 57 (1985); *id.* at 61 (White, J., dissenting).

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[17] Arkansas' determination to persist for as long as possible with its highway tax discrimination against out-of-state vehicles has not been confined to the executive and judicial branches. When Arkansas enacted its 2½¢ per mile replacement tax, it exempted for the first year those who had paid the HUE tax. As a consequence, high-mileage users of the State's highways (mostly Arkansas-based operators) retain the benefit of the flat tax, and the discrimination against less frequent users (mostly non-Arkansas-based operators) has been perpetuated for another year.

See also *id.* at 55 n.3 (date landmark decision was "announced"); *United States* v. *Johnson*, 457 U.S. at 542-543; *City of Phoenix* v. *Kolodziejski*, 399 U.S. 204, 214 (1970) (prospective decision in civil case effective "as of June 23, 1970, the date of this decision"). In the case of the prohibition of flat highway taxes, that date was June 23, 1987. If a tax is invalid under *Scheiner*, there is simply no basis for allowing it to be collected and retained from June 23, 1987 forward, with respect to a tax year beginning after that date.

As discussed more fully in the preceding point, the threshold requirement of the *Chevron* test for non-retroactivity is that the decision in question embody a new principle of law. The opinion of the Arkansas Supreme Court might be read to suggest that the date of Justice Blackmun's escrow order is the appropriate one for non-retroactivity purposes because it was his accompanying opinion that "put [the State] on notice" that the HUE tax was likely to be held invalid. If this was the court's meaning, it is flatly erroneous. As discussed above (pages 25-26, *supra*), the fate of the HUE tax was unmistakably sealed by the *Scheiner* decision. Certainly Justice Blackmun's opinion gives no suggestion that he believed he was announcing a new rule of law. Thus, whatever may be said as to whether *Scheiner* should be non-retroactive, there is no tenable argument that Justice Blackmun's escrow ruling (or any other post-*Scheiner* decision) lays down a new legal principle and can be used to establish a non-retroactivity date that is later than June 23, 1987.

The decision below conflicts with the ruling of Maryland's highest court on the right of that State to collect and retain its flat highway tax with respect to post-*Scheiner* highway use. *American Trucking Associations, Inc.* v. *Goldstein*, 541 A.2d 955 (Ct. App. 1988). The trial court in *Goldstein* had invalidated Maryland's flat $25 decal tax as not materially distinguishable from the Pennsylvania marker fee struck down in *Scheiner*, but had

permitted the State to continue to collect the tax through June 30, 1988. The Court of Appeals reversed, holding that the non-retroactivity principles of *Chevron* could not justify a refusal to refund taxes relating to "operative events occurring after the date of the [*Scheiner*] decision" (541 A.2d at 959). Such an outcome, the court recognized, would amount to a refusal to give this Court's decision *prospective* effect, something that could be done, if at all, only in the most extraordinary circumstances of a kind plainly not present in this sort of case. *Id.* at 959-962.

In sum, this aspect of the case involves an egregious violation of the principle that the decisions of this Court must be followed by the courts of the states. See, *e.g.*, *Stanton* v. *Stanton*, 429 U.S. 502, 503 (1977) (summary reversal of a decision that "obviously" was "inconsistent with our opinion in" a prior proceeding); *Jackson* v. *Lykes Bros. Steamship Co.*, 386 U.S. 731, 732 (1967) ("We granted certiorari because it appeared that, in deciding as they did, the Louisiana courts had failed to follow our holding in" a prior case.). The Arkansas Supreme Court had "little doubt" (App., *infra*, 3a) that, under the principles of *Scheiner*, this Court would hold the HUE tax unconstitutional. That being so, it was entirely improper for it to countenance continued enforcement of that tax with respect to post-*Scheiner* highway use. This Court should grant review in order to make clear that state governments must give immediate effect to its constitutional rulings.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ANDREW L. FREY
Counsel of Record
MARK I. LEVY
DOUGLAS K. MAYER
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 463-2000

Of Counsel:
WILLIAM S. BUSKER
American Trucking Associations, Inc.

DANIEL R. BARNEY
ROBERT DIGGES, JR.
LAURIE T. BAULIG
ATA Litigation Center
2200 Mill Road
Alexandria, VA 22314-4654
(703) 838-1865

PETER G. KUMPE
GREGORY T. JONES
Wright, Lindsey & Jennings
2200 Worthen Bank Building
Little Rock, AR 72201
Counsel for Petitioners

AUGUST 1988

APPENDICES

APPENDIX A

SUPREME COURT OF ARKANSAS

No. 85-101

AMERICAN TRUCKING ASSOCIATION, INC., *et al.*,
Appellants

v.

HENRY C. GRAY, DIRECTOR, ARKANSAS HIGHWAY AND TRANSPORTATION DEPARTMENT, *et al.*,
Appellees

Opinion delivered: Mar. 14, 1988

UPON REMAND FROM THE UNITED STATES SUPREME COURT

Appeal from Pulaski County Chancery Court, Fourth Div.

HONORABLE BRUCE T. BULLION, Chancellor

DAVID NEWBERN, *Justice*

The appellants, American Trucking Associations, Inc., et al., (ATA) challenged the constitutionality of Act 685 of 1983, which instituted the Arkansas Highway Use Equilization Tax (HUE Tax), as a violation of the Commerce Clause. The Pulaski County Chancery Court upheld the tax, and we affirmed. *American Trucking Associations, Inc. v. Gray*, 288 Ark. 488, 707 S.W.2d 759 (1986). While the case was on certiorari, the Supreme Court decided *American Trucking Associations, Inc. v. Scheiner*, —— U.S. ——, 107 S.Ct. 2829 (1987), invalidating a similar Pennsylvania tax. The Supreme Court

vacated our judgment in the *Gray* case and remanded it to us for reconsideration in light of its decision in the *Scheiner* case. On August 14, 1987, the appellees, Henry C. Gray, Director of the Arkansas Highway and Transportation Department, et al., were ordered by Mr. Justice Blackmun, in his capacity as Circuit Justice, to place HUE tax receipts in an interest-bearing escrow. As directed, we now reconsider our prior decision of the case. In addition to the basic question of the constitutionality of the act, we have been asked by the appellant class represented by ATA to decide whether and to what extent taxes collected pursuant to the act are to be refunded if the act is invalidated. We are also asked to determine whether counsel for ATA are entitled to court ordered attorney fees. We hold that the act is unconstitutional, the taxpayers represented by ATA are entitled to have refunded the taxes they have paid into the escrow fund, and the case is to be remanded to the chancery court to determine the manner of refund distribution and payment of attorney fees.

1. *Unconstitutionality*

We need not set out the details of the HUE tax, as that was done in our earlier opinion in this case. Nor do we need to detail the Pennsylvania tax, which was held invalid in the *Scheiner* case, and the somewhat persuasive arguments about how the HUE tax differs significantly from the Pennsylvania tax. The important point to recognize is that, in the *Scheiner* case, the Supreme Court applied its "internal consistency" test and said, in effect, that if a state's tax treats truckers whose bases of operations are outside the state differently from those based in the taxing state, it violates the Commerce Clause. It is conceded that the HUE tax effectively costs other truckers more per mile than it costs those based in Arkansas, despite the option, which is available to all, to pay a flat rate or a per-mile rate or a trip rate. Therefore, we

have little doubt that the Supreme Court would hold that the HUE tax is unconstitutional, and that is our holding.

2. *Refunds*

The HUE tax promulgated by Act 685 of 1983 was repealed by Act 3 of 1987 (2nd Ex. Sess.). Thus, our decision that the tax was unconstitutional is unimportant except to the extent it may call for refunds. From the time the tax was enacted until Mr. Justice Blackmun's order of August 14, 1987, some $159 million was collected and funneled to the state treasury. After the escrow account was created, some $4.9 million was collected and placed in the account. As the HUE tax was paid by all truckers, it is obvious that some of it was paid by those based in Arkansas. Some Arkansas HUE taxpayers have intervened on behalf of all such taxpayers contending, along with the appellees, that the non-Arkansas based truckers are not entitled to a refund. The Arkansas HUE taxpayers have also made it clear that they seek no refund.

To hold the interstate truckers were entitled to all of their HUE tax payments, we would have to apply to *Scheiner* decision retroactively. It should only be applied prospectively. The Supreme Court, in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), stated three factors to be considered in deciding to apply a judgment prospectively: (1) The judgment establishes a new rule of law overruling cases or arises from a case of first impression. (2) The purpose of the law will not be thwarted by prospective application. (3) A general balancing of the equities favors prospective application.

The first factor is aimed at whether it was reasonable for the state to have conducted itself as it did, given prior Supreme Court interpretations of the Commerce Clause. The *Scheiner* decision notes that several other states besides Arkansas and Pennsylvania had enacted

so-called "flat" highway taxes. Justice O'Connor, in her dissenting opinion, noted that these taxes would probably be found violative of the Commerce Clause pursuant to the *Scheiner* holding. The *Scheiner* case was decided five justices to four with strong dissenting opinions. It declared invalid a tax which a reasonable person could easily have found to pass Commerce Clause muster upon examination of *Aero Mayflower Transit Co. v. Bd. of R.R. Comm'rs of Montana*, 332 U.S. 495 (1947), and *Aero Mayflower Transit Co. v. Georgia Public Serv. Comm'n*, 295 U.S. 285 (1935) in which "flat" highway taxes were held not violative of the Commerce Clause. We relied on those cases, among others, in our original opinion in this case.

Second, the purpose of the law espoused in the *Scheiner* decision is to secure equal treatment for inter- and intrastate commerce and thus create an area of free trade among the states. No doubt prospective application will help achieve that goal. We agree with the Washington Supreme Court which recently found itself having to decide whether a Supreme Court decision would operate only prospectively with respect to invalidation of the Washington business and occupation tax. "It is difficult to understand how retroactive application would encourage free trade among the states since whatever chill was imposed on interstate trade is in the past and the Legislature has enacted law to attempt to comport with the new commerce clause taxation laws announced in *Tyler* [*Tyler Pipe Indus., Inc. v. Department of Rev.*, —— U.S. ——, 107 S.Ct. 2810 (1987)]." *National Can Corp. v. Department of Revenue*, 109 Wash. 2d 878, —— P.2d —— (1988).

The equities favor disallowing refund of the tax money already paid into the state treasury. The interstate, non-Arkansas based truckers have used Arkansas highways with their heavy trucks to which the HUE tax applied since 1983. To refund everything paid by them since

that date would allow them an unconscionable windfall far in excess of a fair recovery for the discrimination they may have suffered due to the tax. It would constitute unfair treatment of the Arkansas-based truckers who have paid the tax and seek no refund. It is fair, however, to allow to the ATA class a refund of the HUE tax money paid into escrow since August 14, 1987, when the appellees were put on notice that the ATA's claims were ones which were likely to succeed on their merits. The escrowed funds have not been placed in the state treasury and spent or, presumably, counted on for the future.

3. Attorney fees

We have consistently recognized that when a class action results in the recovery of a "common fund" it is proper to allow attorney fees to be paid from the fund. *Powell v. Henry*, 267 Ark. 484, 592 S.W.2d 107 (1980); *Marlin v. Marsh*, 189 Ark. 1157, 76 S.W.2d 965 (1934).

Conclusion

The case is remanded to the chancellor to determine the means by which the payments made by non-Arkansas based truckers into the HUE tax escrow fund may be refunded pro rata after deduction of attorney fees to be determined by the chancellor.

Reversed and remanded.

Hickman, J., dissents in part.

SUPREME COURT OF ARKANSAS

No. 85-101

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
Appellants,

v.

HENRY C. GRAY, DIRECTOR,
ARKANSAS HIGHWAY AND TRANSPORTATION DEPARTMENT,
Appellees.

Opinion Delivered March 14, 1988

DARRELL HICKMAN, *Associate Justice*

I agree with the court's decision except regarding the refund. If the United States Supreme Court's decision in *American Trucking Associations, Inc. v. Schiener*, —— U.S. ——, 107 S.Ct. 2829 (1987), is to be applied prospectively, then the refund should be made from the date of that decision, or certainly no later than when we were asked, in July 1987, to place the funds in escrow. Our decision denying that request should have reflected that I did not participate.

DISSENT IN PART.

APPENDIX B

OFFICE OF THE CLERK
SUPREME COURT OF THE STATE OF ARKANSAS
ARKANSAS COURT OF APPEALS
Justice Building
Little Rock, AR 72201

April 25, 1988

Peter G. Kumpe
Gregory T. Jones
Attorneys at Law
2200 Worthen Bank Building
Little Rock, AR 72201

Re: 85-101, American Trucking Associations, Inc. et al v. Henry C. Gray, Director, Arkansas Highway and Transportation Department et al

Gentlemen:

The Court made the following order in the above styled case today:

"Petition for Rehearing is denied.
Hickman, J., would grant."

Sincerely yours,

/s/ Leslie W. Steen
LESLIE W. STEEN
Clerk

LWS/rh

cc: Eugene G. Sayre
Pat Moran
Daniel R. Barney
Andrew L. Frey
Joe Morphew
Steve Clark
Ted Goodloe
B. Michael Bennett
Edward L. "Skip" Cullum
(#83-2360)

APPENDIX C

SUPREME COURT OF THE UNITED STATES

No. A-100

AMERICAN TRUCKING ASSOCIATION, INC., *et al.*

v.

HENRY C. GRAY, DIRECTOR, ARKANSAS HIGHWAY AND TRANSPORTATION DEPARTMENT, *et al.*

ON APPLICATION FOR WRIT OF INJUNCTION

[August 14, 1987]

JUSTICE BLACKMUN, Circuit Justice.

This is an application for an injunction that would require Arkansas state officials to establish an escrow fund in which payments of the Arkansas Highway Use Equalization (HUE) tax, see Ark. Stat. Ann. §§ 75-817.2 and .3 (Supp. 1985), shall be placed, pending further proceedings challenging the constitutionality of that tax in Arkansas courts. The applicants, American Trucking Associations, Inc., et al. (ATA), brought suit in 1983 to challenge the HUE tax under the Commerce Clause, Art. I, § 8, cl. 3, of the Federal Constitution. The Chancery Court of Pulaski County sustained the constitutionality

of the tax, and a divided Arkansas Supreme Court affirmed. *American Trucking Assn., Inc.* v. *Gray*, 288 Ark. 488, 707 S. W. 2d 759 (1986). ATA appealed to this Court under 28 U. S. C. § 1257(2). We held the case pending our decision in No. 86-357, *American Trucking Assns., Inc.* v. *Scheiner*, which involved a similar constitutional challenge to two flat highway use taxes enacted by the Commonwealth of Pennsylvania. On June 23, 1987, this Court ruled in the Pennsylvania case that the Commonwealth's highway taxes violated the Commerce Clause because "the taxes are plainly discriminatory" in that they impose a heavier burden on out-of-state businesses that compete in an interstate market than they impose on local businessses that engage in similar commerce. 483 U. S. ——, —— (slip op. 18). The Court explained further that the Pennsylvania taxes failed the "internal consistency" test because "[i]f each State imposed flat taxes for the privilege of making commercial entrances into its territory, there is no conceivable doubt that commerce among the States would be deterred." *Id.*, at —— (slip op. 17). We then vacated the judgment of the Arkansas Supreme Court and remanded the present case for further consideration in light of *Scheiner*. —— U. S. —— (1987). On July 16, 1987, pursuant to this Court's Rule 52.2, I granted ATA's motion for immediate issuance of the mandate.

Upon remand, ATA moved for further remand to the Chancery Court so that it could petition for a preliminary injunction either to enjoin enforcement of the HUE tax or to order an escrow of the funds collected. The Arkansas Supreme Court denied the motion. It also denied ATA's application for temporary relief, in the form of an escrow, pending decision in this case. That court is now in summer recess and consequently will not consider the merits of ATA's challenge until this fall, at the earliest. Applicants have requested that I order an escrow of the tax revenues pending final disposition of the case on the merits.

Several factors control a single Justice's consideration of an application for writ of injunction pursuant to this Court's Rule 44. If there is a "significant possibility" that the Court would note probable jurisdiction of an appeal of the underlying suit and reverse, and if there is a likelihood that irreparable injury will result if relief is not granted, the Justice may issue an injunction. See *Nebraska Press Assn.* v. *Stuart*, 423 U.S. 1327, 1330 (1975) (BLACKMUN, J., in chambers). See also, *e. g.*, *Ledbetter* v. *Baldwin*, 479 U.S. ——, —— (1986) (Powell, J., in chambers); *Rostker* v. *Goldberg*, 448 U. S. 1306, 1308 (1980) (BRENNAN, J., in chambers). Applying these principles to the facts before me, I grant the application.

After considering the submissions of applicants and respondents, I have concluded that ATA is likely to succeed on the merits of its challenge to the Arkansas HUE tax. The effect of the HUE tax is substantially similar to that of the Pennsylvania unapportioned flat taxes invalidated in *Scheiner*. For most motor carriers, the HUE tax is a flat amount that is not assessed in proportion to the taxpayer's presence in the State. According to the statistics presented to the Arkansas courts, in its practical operation the tax discriminates against interstate motor carriers whose trucks are registered outside Arkansas. On average, trucks registered outside Arkansas pay a per-mile HUE tax that is more than three times greater than the per-mile tax paid by trucks registered in Arkansas. Respondents argue that the validity of this statistical evidence has not been established. But given the structure of the tax, which benefits trucks that travel extensively within the State, it appears probable that any further analysis would confirm the discriminatory impact. Moreover, the tax exposes trucks that engage in extensive interstate operations to a cumulative tax burden that is not shared by trucks that operate in only one or a few States. The tax thus works to deter interstate commerce. I therefore find that there

is a significant possibility that the Arkansas courts will declare the HUE tax unconstitutional under the "internal consistency" test pronounced by this Court in *Scheiner*. If they fail to do so, I believe that there is a significant possibility that four Justices will consider the issue sufficiently meritorious to note probable jurisdiction and that this Court will reverse the decision.

I have also concluded that the applicants risk irreparable injury absent injunctive relief. Arkansas officials have expressed their intention to continue collecting the HUE taxes during the pendency of the case and have refused to accept payment of the taxes "under protest." Motor carriers operating interstate must pay the annual HUE tax by August 31. If motor carriers refuse to pay the tax pending a determination of its constitutionality, they will be barred from the State's highways and will suffer substantial economic losses. On the other hand, if motor carriers pay the tax, there is a substantial risk that they will not be able to obtain a refund if the tax ultimately is declared unconstitutional. Applicants assert, by way of affidavit, that the Arkansas Highway Department has informed them that, should the tax be invalidated, the State will assert immunity from any subsequent refund order. Respondents have not denied that they will adopt this stance. There is a risk that, like other state courts, the Akansas courts would deny restitution of taxes found to have been unconstitutionally collected. See, *e. g.*, *Private Truck Council of America, Inc.* v. *New Hampshire*, 128 N. H. 466, 517 A. 2d 1150, 1155-1157 (1986); *American Trucking Assns., Inc.* v. *Conway*, 146 Vt. 579, 508 A. 2d 408, 413-414 (1986), cert. denied, 483 U. S. —— (1987). Such a denial would constitute irreparable injury.

For their part, respondents will not be irreparably injured by the issuance of the injunction. Respondents have not argued that the temporary loss of revenues, while the funds are held in escrow, will adversely affect

the State's operations. Rather, they contend that the State will be harmed if the funds are returned to the motor carriers, because the HUE tax is intended to defray the cost of wear on Arkansas' highways attributable to the heavy trucks subject to the tax. But the requested injunction would not direct a refund. If the funds are escrowed and the HUE tax is invalidated, the issue of the appropriate remedy will be a separate matter for the Arkansas courts to determine. On balance, therefore, I conclude that the equities favor issuance of the injunction. Accordingly, I have today entered an order enjoining respondents to escrow the HUE taxes to be collected, until a final decision on the merits in this case is reached.

APPENDIX D

STATE OF ARKANSAS
IN THE SUPREME COURT

BE IT REMEMBERED, That at a term of the Supreme Court of the State of Arkansas, begun and held at the Court Room in the City of Little Rock, on the 6th day, being the first Monday of October, A. D. 1986, amongst others were the following proceedings, to-wit:

On the 30th day of July, A. D. 1987, a day of said term—

No. 85-101

AMERICAN TRUCKING ASSOCIATION, INC. *et al*
Appellants

vs.

HENRY C. GRAY, DIRECTOR, ARKANSAS HIGHWAY & TRANSPORTATION DEPARTMENT, *et al*
Appellees

Appeal from Pulaski Chancery Court,
Fourth Div. District

LAW OR CHANCERY MANDATE

Appellants' application for temporary relief is denied. Glaze, J., not participating.

IN TESTIMONY, That the above is a true copy of the order of said Supreme Court, rendered in the case herein stated, I, Dona L. Williams, Clerk of said Supreme Court, hereunto set my hand and affix the Seal of said Supreme Court, at my office in the city of Little Rock, this 30th day of July, A.D. 1987.

/s/ Dona L. Williams
Clerk

APPENDIX E

STATE OF ARKANSAS
IN THE SUPREME COURT

BE IT REMEMBERED, That at a term of the Supreme Court of the State of Arkansas, begun and held at the Court Room in the City of Little Rock, on the 6th day, being the first Monday of October, A. D. 1986, amongst others were the following proceedings to to-wit:

On the 20th day of July, A. D. 1987, a day of the said term—

No. 85-101

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al*
Appellants

vs.

HENRY C. GRAY, DIRECTOR, ARKANSAS HIGHWAY & TRANSPORTATION DEPARTMENT, *et al*
Appellees

Appeal from Pulaski Chancery Court
Fourth Div. District

(Chancery Court Case No. 83-2360 & 84-374)

LAW OR CHANCERY MANDATE

Appellants' motion to remand to chancery court upon receipt of mandate is denied. To be briefed under Rule 16. Hickman and Glaze, JJ., not participating.

IN TESTIMONY, That the above is a true copy of the order of said Supreme Court, rendered in the case herein stated, I, Dona L. Williams, Clerk of said Supreme Court, hereunto set my hand and affix the Seal of said Supreme Court, at my office in the city of Little Rock, this 20th day of July, A. D. 1987.

/s/ Dona L. Williams
Clerk

APPENDIX F

SUPREME COURT OF THE UNITED STATES

No. 86-358

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
Appellants,

v.

HENRY C. GRAY, DIRECTOR, ARKANSAS HIGHWAY AND TRANSPORTATION DEPARTMENT, *et al.*

Appeal from the Supreme Court of Arkansas

THIS CAUSE having been submitted on the statement of jurisdiction and motion to dismiss,

ON CONSIDERATION WHEREOF, it is ordered by this Court that the appeal herein be, and it is hereby, vacated with costs, and that this cause is remanded to the Supreme Court of Arkansas for further consideration in light of *American Trucking Associations, Inc.* v. *Scheiner*, 483 U.S. —— (1987).

IT IS FURTHER ORDERED that the appellants, American Trucking Associations, Inc., et al., recover from Henry C. Gray, Director, Arkansas Highway and Transportation Department, et al. Two Hundred Dollars ($200.00) for their costs herein expended.

June 26, 1987

Clerk's costs: $200.000

APPENDIX G

SUPREME COURT OF ARKANSAS

No. 85-101
85-112

AMERICAN TRUCKING ASS'N., INC., *et al.*,
Appellants,

VS.

HENRY C. GRAY, DIR., ARK. HIGHWAY & TRANS. DEP'T, *et al.*,
Appellees,

and

AMERICAN TRUCKING ASS'N., INC., *et al.*,
Appellants,

VS.

CHARLES D. RAGLAND, COMM'R OF REVENUES, REVENUE DIV., *et al.*,
Appellees.

Appeal from Pulaski Chancery Court,
4th Div., Bruce T. Bullion,
Chancellor, #83-2360

Appeal from Pulaski Chancery Court,
2nd Div., John Earl, Chancellor,
#84-374

Opinion Delivered Apr. 14, 1986

JACK HOLT, JR., *Chief Justice*

In this consolidated appeal, the constitutionality of Act 685 of 1983, Ark. Stat. Ann. §§ 75-817.2, 75-817.3 and 75-819(b) (Supp. 1985), is challenged. The Act imposed a Highway Use Equalization (HUE) tax on all trucks that operate on Arkansas highways at maximum weights between 73,281 and 80,000 pounds. The appellants, American Trucking Association[s], Inc., (ATA), filed a complaint in Pulaski Chancery Court, fourth division, against appellees, Arkansas Highway and Transportation Department, alleging that the HUE tax would be an "illegal exaction." Appellants requested a temporary restraining order preventing the money collected under Act 685 from being deposited into the state treasury. Chancellor Bruce Bullion dissolved the temporary restraining order and denied appellants' requested preliminary injunction. That decision was appealed to this court. We affirmed Chancellor Bullion's decision and reserved any further consideration until after a trial on the merits. *American Trucking Ass'n, Inc., et al v. Gray, Director*, 280 Ark. 258, 657 S.W.2d 207 (1983).

The case was remanded, certified as a class action, and the trial on the merits was held. Appellants attempted to prove that the HUE tax as written and administered was violative of the commerce clause, the privileges and immunities clause, and the equal protection clause of the fourteenth amendment to the United States Constitution. Chancellor Bullion ruled on October 11, 1984, that the tax was constitutional and that appellants' counsel were not entitled to attorneys' fees.

On January 25, 1984, the companion case of *ATA, Inc., et al v. Charles D. Ragland, et al*, was filed in the second division of Pulaski Chancery Court. That complain also challenged the tax as an illegal exaction and alleged that Act 685, which was approved by a mere majority vote of the General Assembly, was subject to the three-fourths voting majority required by amedment

19 § 2 of the Arkansas Constitution. Chancellor John Earl granted appellees' motion for summary judgment on this issue. Since the facts and issues in the two appeals are similar, they were consolidated in this court. Our jurisdiction is pursuant to Sup. Ct. R. 29(1)(a), (c), and (j). We uphold the constitutionality of Act 685.

Act 685 provides that the HUE tax is to be administered for all Arkansas base-registered trucks by the Commissioner of Revenues of the Revenue Division of the Department of Finance and Administration, while the Director of the Arkansas State Highway and Transportation Department administers the tax for all non-Arkansas base-registered trucks. The Act provides that the HUE tax for all vehicles can be satisfied through the election to pay:

1) an annual flat fee of $175;

2) a fee equal to 5¢ per mile for every mile the truck travelled in Arkansas during the previous registration year; or

3) for the purchase of a trip permit at the rate of $8.00 per hundred miles driven.

The appellants primarily rest their arguments on the results of a survey conducted by ATA regarding Arkansas and non-Arkansas base-registered trucks upon which the HUE tax is imposed. The survey results, according to appellants, established that the average cost of complying with the HUE tax, on a per mile of operation basis, affects non-Arkansas base-registered trucks at a rate 370% higher than it impacts Arkansas base-registered trucks. Under these circumstances, appellants maintain the practical effect of the HUE tax is to unconstitutionally discriminate against the non-Arkansas based vehicles' use of the highways. The appellants urge seven points for reversal, which will be discussed individually.

I.

THE HUE TAX VIOLATES THE COMMERCE CLAUSE

States are not permitted to tax interstate commerce in a manner that discriminates in favor of local interests. *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959); *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318 (1977).

The appellants pursue two theories in their commerce clause argument. First, they state the HUE tax, although facially neutral, imposes a far higher effective tax rate on out-of-state trucks than on in-state trucks for the same use of the highways. Their second argument is that as a flat, nonproportional tax, it is not fairly related to the level of highway services provided by the state to each HUE taxpayer.

In *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), the United States Supreme Court considered the validity of a state sales tax under the commerce clause. The Court noted that under its prior decision in *Spector Motor Service v. O'Connor*, 340 U.S. 602 (1951), a state tax on the "privilege of doing business" was *per se* unconstitutional when it is applied to interstate commerce. In *Brady*, the Supreme Court overruled *Spector*, and instead, applied a four-part test to determine constitutionality under the commerce clause. Under that test a tax is valid when the tax (1) "is applied to an activity with a substantial nexus with the taxing State", (2) "is fairly apportioned", (3) "does not discriminate against interstate commerce", and (4) "is fairly related to the services provided by the State." In *Burlington N.R.R. Co. v. Ragland, Comm'r*, 280 Ark. 182, 655 S.W. 2d 437 (1983), we acknowledged that "whenever there is a challenge to any state tax on interstate commerce, the tax will be subjected to the *Brady* test."

The appellants maintain that the HUE tax fails to meet the third and fourth prongs of the *Brady* test. Since they admit that the tax is facially neutral, the appellants are claiming in their discussion of the third prong, that its practical effect is to discriminate against interstate commerce. This argument is based on the results of the ATA survey discussed previously. Although several arguments, pro and con, are made about the veracity of the ATA survey, we find no evidence that the HUE tax discriminates against interstate commerce. The tax is structured to offer three options for compliance. A truck that meets the criteria of the tax may pay an annual flat fee, a fee based on mileage, or buy a trip permit. These options are available to intrastate and interstate carriers alike. The money collected is used to offset highway repairs and costs and thus the HUE tax is in the nature of a user fee or tax.

In *Aero Mayflower Transit Co. v. Georgia Public Serv. Comm'n, et al*, 295 U.S. 285 (1935), the U.S. Supreme Court discussed a Georgia statute imposing an annual license fee for the maintenance of the highways. The Court found the statute did not lay an unlawful burden on interstate commerce. In so holding, the Court noted that the fee is a moderate amount, it is used for the upkeep of highways, and "it is exacted without hostility to foreign or interstate transactions, being imposed also upon domestic vehicles operated in like conditions." There, too, the Court was confronted with the argument that the out-of-state carrier uses the roads of Georgia less than the local carriers, yet they pay the same amount. The Court held, "[t]he fee is for the privilege of a use as extensive as the carrier wills that it shall be. There is nothing unreasonable or oppressive in a burden so imposed. . . . One who receives a privilege without limit is not wronged by his own refusal to enjoy it as freely as he may" (citation omitted).

Here, the amount of the fee is not being challenged as unreasonable *per se*, the money is used for the upkeep of

the highways traveled by the carriers being taxed, and the tax applies to foreign and domestic carriers alike. The interstate carriers can opt to pay the flat fee. The fact that they do not make extensive use of the state's highways does not make the tax levied discriminatory.

Again, in *Aero Mayflower Transit Co. v. Bd. of R.R. Comm'rs of Montana, et al*, 332 U.S. 495 (1947), the Supreme Court discussed two flat highway taxes imposed "in consideration of the use of the highways of this state." The Court found neither exaction discriminated against interstate commerce since each applies alike to local and interstate operations and neither taxes traffic or movements taking place outside Montana. The Court stated:

> Motor carriers for hire, and particularly truckers of heavy goods, like appellant, make especially arduous use of roadways entailing wear and tear much beyond that resulting from general indiscriminate public use. . . . Although the state may not discriminate against or exclude such interstate traffic generally in the use of its highways, this does not mean that the state is required to furnish those facilities to it free of charge or indeed on equal terms with other traffic not inflicting similar destructive effects. . . . Interstate traffic equally with intrastate may be required to pay a fair share of the cost and maintenance reasonably related to the use made of the highways. (citations omitted).

The appellants maintain that the *Brady* decision overruled the Court's early decisions in the two *Aero Mayflower* cases. We disagree. The Court expressly overruled only *Spector*. It did not so treat these cases. Furthermore, in *Massachusetts v. United States*, 435 U.S. 444 (1978), decided one year after *Brady*, the Supreme Court analogized the problem of a flat fee registration tax on all civil aircraft, to their previous motor vehicle tax cases, citing the Montana *Aero Mayflower* decision.

The Maryland Court of Appeals reached a similar conclusion in *American Trucking Ass'ns, Inc., et al v. Goldstein, et al*, 483 A.2d 47 (Md. 1984), using reasoning we now adopt. That court discussed an annual registration fee imposed on all motor carriers operated in Maryland. The Maryland court specifically found that *Brady* "did not undercut the previously discussed flat highway user tax cases", which included both *Aero Mayflower* decisions.

In finding that the registration fee did not discriminate against interstate commerce under *Brady*, the Maryland court noted that "[i]t is not aimed at placing interstate business at a competitive disadvantage with local businesses", it "applies equally" to in-state and out-of-state registered motor carriers, and its purpose "is not to protect local carriers against foreign competition." Rather, the court noted its purpose "is to spread evenly among all commercial users the tax burden of supporting Maryland's highway system." The HUE tax meets the same criteria and accomplishes the same purposes.

The appellants claim their statistics show that the HUE tax is discriminatory because, on a cost per mile basis, out of state truckers are charged more. Assuming their statistics are valid, the flat tax portion of our law must, logically, be the most onerous provision. The per mile or per trip alternatives benefit the out of state truckers by permitting them to pay less than the flat tax. We need go no further than to cite the cases holding that a flat tax is not discriminatory. The alternatives offered by our law, which in fact could benefit the out of state truckers, do not make this case distinguishable from the ones approving the flat rate as being a proper tax method in the context of a commerce clause challenge.

As to the argument under the fourth prong of *Brady*, that as a flat tax, it is not fairly related to the level of highway services provided by the state to each HUE

taxpayer, it can be answered under the same authority as the previous argument.

The first "flat fee" case dealt with by the U.S. Supreme Court was the Georgia *Aero Mayflower* case, supra. The Court upheld the flat tax then, and in subsequent flat fee cases, holding that a state may impose a flat fee for the privilege of using its roads. In *Capitol Greyhound Lines, et al v. Bruce, Comm'r*, 339 U.S. 542 (1950), the Court held that the formula used in calulating the flat tax was not crucial, rather the relevant inquiry was whether the amount of the tax was excessive. We agree. Acts of the Legislature are presumed to be constitutional and will not be held by the courts to be unconstitutional unless there is a clear incompatibility between the act and the constitution, with all doubts resolved in favor of the act. *Pulaski County Municipal Court v. Scott*, 272 Ark. 115, 612 S.W.2d 297 (1981). Here, the flat tax rate of $175 was not shown to be excessive or unreasonable.

II.

THE HUE TAX VIOLATES THE EQUAL PROTECTION CLAUSE

The fourteenth amendment to the U.S. Constitution provides that no person shall be denied equal protection of the law by any state. Before a statute can be reviewed under the equal protection guarantee, a party must demonstrate that the law classifies persons in some manner. Nowak, Rotunda, & Young, *Constitutional Law*, p. 600 (2d ed. 1983). There are three ways to establish a classification: the statute may do so on its face; a facially neutral statute may be applied unevenly to different groups by those administering it; or a facially neutral law, applied evenhandedly, in reality may constitute a device designed to impose different burdens on different classes of persons. *Id.* The appellants argue

that the tax classifies carriers based on interstate versus intrastate commerce.

Once a classification is found to exist, the equal protection analysis turns on whether the classification bears a rational relationship to a legitimate state interest.

We need not reach the rational relationship test, however, because no classification exists. The appellants acknowledge that the statute is facially neutral, so the first method of classifying its not established. The other two methods concern the uneven application and the burdensome effect of a neutral statute. We have already indicated in our discussion of the commerce clause that the statute is applied to interstate and intrastate carriers alike and does not have a discriminatory effect on interstate commerce. Since interstate commerce is not singled out for disparate treatment, no classification on that basis is made, and no equal protection problem arises.

III.

THE HUE TAX VIOLATES THE PRIVILEGES & IMMUNITIES CLAUSE

The privileges and immunities clause provides that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the Several States." United States Constitution, Art. IV, § 2. It is well established that the privileges and immunities clause is inapplicable to corporations. *Hemphill v. Orloff*, 277 U.S. 537 (1928); *Western & Southern Life Ins. Co. v. State Bd. of Equalization of Calif.*, 451 U.S. 648 (1981). The named appellants, ATA, et al, are all corporations. Nevertheless, they argue that since their complaint was certified as a class action, there are non-corporate individuals within the class which permits them to raise a privileges and immunities challenge, citing *City of Little Rock v. Cash*, 277 Ark. 494, 644 S.W.2d 229 (1982), *rehearing denied. Cash* does not stand for that proposi-

tion. The lawsuit in that case was filed by six residents of the city of Little Rock who were water users. The case was certified as a class action. There is no discussion about corporate and noncorporate parties. Nor did our research indicate that there is any case law stating that it will be assumed that noncorporate individuals are included in a class action in a case such as this. In fact in *ATA, et al v. Goldstein, et al, supra*, the same appellants attempted to raise a privileges and immunities argument. The Maryland court noted that the clause was inapplicable to corporations and stated: "[a]ll of the named plaintiffs are corporations. As such, they have no standing to challenge § 423(a) under the Privileges and Immunities Clause of Art. IV." Here, as in that case, all the named plaintiffs are corporations. Therefore, they have no standing to make this argument.

IV.

THE ARBITRARY & DISCRIMINATORY REGULATIONS & ADMINISTRATION OF THE HUE TAX ARE UNCONSTITUTIONAL

Act 685 divides authority for the administration of the HUE tax between the Commissioner of Revenue of the Department of Finance & Administration (DF&A), for Arkansas base-registered vehicles; and the Director of the Arkansas State Highway & Transportation Department (ASH&TD), for non-Arkansas base-registered vehicles. Appellants do not object to the regulations or administration by the DF&A. Their argument under this point instead is directed toward the ASH&TD, whose regulations and policies, they maintain, violate the commerce clause, the privileges and immunities clause, and the equal protection clause of the Constitution.

We can immediately dispense with the privileges and immunities argument since the named appellants are

corporations. As to the commerce clause and equal protection allegations, the appellants maintain that the regulations and policies of the ASH&TD violate the first and third prongs of the *Brady* test, *supra*. The appellants specifically object to (a) the ASH&TD's general approach, (b) the specialty carrier status, and (c) fleet registration.

(a) The general policies named by appellants are that the ASH&TD, unlike the DF&A, does not allow the owner/operator of non-Arkansas base-registered trucks the option of choosing whether to qualify their trucks by weight for the use of the highways afforded by payment of the HUE tax. The policy appellants are challenging requires non-Arkansas base-registered trucks to either declare that they are carrying 73,281 pounds in Arkansas and pay the HUE tax, or else take some affirmative action to elect not to carry that weight. A non-Arkansas base-registered truck who has not taken either of these actions is not allowed to enter the state. This affirmative action is burdensome on interstate commerce according to the appellants.

The appellants' argument is without merit. All trucks must decree their gros weight for travel in Arkansas. Arkansas base-registered vehicles do so when they register in this state. Those Arkansas vehicles who participate in the International Registration Plan (IRP) declare their weight by a sworn statement on the IRP application. Obviously, a comparable opportunity was needed for non-Arkansas base-registered carriers to declare their gross weight. The Highway Department established a mechanism where a carrier could either qualify and pay the HUE tax or formally declare a gross weight below 73,281 pounds and obtain a free specialty carrier decal. The state's interest in a weight declaration from all trucks travelling on state highways is apparent, satisfying the first prong of *Brady*.

As to the discrimination issue raised under the third prong, all carriers have to take some affirmative action to declare the weight of their vehicles. Here, ASH&TD had the authority to promulgate its regulation and it is reasonable. As a practical matter the mechanism for registration differed for interstate vehicles, yet the result was the same, without undue burden to interstate commerce. During oral arguments, appellee's counsel explained that to implement registration procedures, it was necessary to utilize a certain policy during the first two years of registration after the act became effective, however, that now there is no difference in registration for those carriers who are members of IRP. They are presently allowed to declare the gross weight of their vehicles when they register in other states. Likewise, non-Arkansas base-registered carriers, who are not members of IRP, still submit an affidavit as to weight and receive a special carrier decal upon entry into Arkansas. These simple methods for carriers to declare gross weight of vehicles for travel in Arkansas are non-discriminatory.

(b) The specialty carrier status was created by regulation and is awarded to carriers entering the state who are carrying below 73,281 pounds or fall within a statutory exemption and are thus not subject to the HUE tax. The specialty carrier decal is given free to those carriers and allows them entry into the state. Appellants contend the status was created by regulation even though the language of Act 685 does not provide a rational basis for the creation of such a classification. This action, they claim, violates the agency's legislative grant of rule-making authority, citing *State, ex rel Attorney General v. Burnett*, 200 Ark. 655, 140 S.W.2d 673 (1940). *Burnett* held that a regulation promulgated by the commissioner of revenues was contrary to the applicable statute and therefore void. The specialty carrier status is not contrary to Act 685. It identifies exemptions to the HUE tax, including trucks carrying less than 73,281

pounds. Since the ASH&TD is required to administer the HUE tax and to do so requires a determination of the gross weight of vehicles using the state's highways, the designation of the speciality carrier status is a way to facilitate collection of that tax and is within the agency's power to promulgate.

(c) Appellants also complain that non-Arkansas base-registered carriers must qualify their trucks by an "integral fleets" classification, under only one payment option. Arkansas-based owner/operators are allowed by DF&A to pick their payment option and apply it to their individual trucks, according to appellants.

The appellants misinterpret the pertinent policies. The actual practices of the ASH&TD and DF&A are the same: they allow one payment option per fleet. Arkansas base-registered vehicles that are registered under the IRP have their mileage reported by the IRP on a fleet basis. That IRP mileage documentation is then used by the DF&A to allow the carrier to select an option for each fleet. Similarly, the ASH&TD allows mileage documentation to be computed on a fleet basis using either IRP records or other records submitted to a governmental entity for some official purpose. Once the fleet is set, in either case, only one option of HUE payment is allowed.

The ASH&TD allows non-Arkansas based carriers, where separate integral fleets exist under one ownership and separate record and reporting systems are maintained for each integral fleet, to select separate options. Highway Department Regulation V(B). The DF&A also has a regulation stating that IRP qualification shall be on a fleet basis and all affected vehicles will pay either of two relevant options. Highway Use Equalization Tax Regulations, paragraph (8). Mary Ellen Garke, head of the Revenue IRP Unit, testified that a single IRP fleet can select an option but the owner has to then exercise the same option with all the trucks in that account or fleet. Since there is no disparate treatment there is no basis for a claim of discrimination.

V.

ACT 685 OF 1983 WAS NOT ADOPTED IN ACCORDANCE WITH THE REQUIREMENTS OF THE ARKANSAS CONSTITUTION

Amendment 19 § 2 of the Arkansas Constitution provides that no rates for "property, excise, privilege or personal taxes now levied shall be increased by the General Assembly except . . . in case of an emergency, the votes of three-fourths of the members elected to each House of the General Assembly."

The appellants suggest that Act 685 is an increase in an existing "privilege tax" and is therefore subject to the three-fourths vote requirement. In support of their allegation that an existing privilege tax has been increased, appellants point to the registration fee charged under Ark. Stat. Ann. § 75-201 (Repl. 1979 and Supp. 1985), as the tax that Act 685 increased. Appellees maintain this is a new tax on the new privilege of carrying larger loads. We find that amendment 19 § 2 is inapplicable because Act 685 does not impose a privilege tax but rather exacts a user fee from motor vehicles carrying the prescribed weight. In *Evansville-Vanderburgh Airport Auth. Dist., et al v. Delta Airlines, Inc.* 405 U.S. 707 (1972), the U.S. Supreme Court explained:

> that a charge designed only to make the user of state-provided facilities pay a reasonable fee to help defray the costs of their construction and maintenance may constitutionally be imposed on interstate and domestic users alike . . .
>
> . . . .
>
> At least so long as the toll is based on some fair approximation of use or privilege for use, . . . and is neither discriminatory against interstate commerce nor excessive in comparison with the governmental benefit conferred, it will pass constitutional muster . . .

Such charges for the use of public facilities, like highways, have been characterized as being in the "nature of rent charged by the State, based upon its proprietary interests in the public property, rather than of a tax." Hartman, *Federal Limitations on State and Local Taxation, Chapt.* 12 p. 665 (1981).

We find that this is a user fee, passed by the Legislature to compensate the state for the wear and tear on the highways caused by trucks carrying the higher weights. It is not a privilege tax in a technical sense. A privilege tax is "[a] tax on the privilege of carrying on a business or a occupation for which a license or franchise is required." Black's Law Dictionary (5th ed. 1979). Trucks not carrying the higher weight are not prohibited from travelling through the state, thus, the HUE tax is not a tax for the privilege of carrying on a business. It is instead a charge for the damage done by trucks carrying the higher weights and is exacted to make repairs. Since the approval of a user fee does not necessitate a three-fourths majority in the Legislature, appellants' argument is without merit.

VI

THE FINDINGS & CONCLUSIONS OF THE CHANCELLORS ARE INSUFFICIENT UNDER ARCP RULE 52(a)

Arkansas Rules of Civil Procedure Rule 52(a) provides that, in contested actions tried by a judge without a jury, if requested by a party, "the court shall find the facts specifically and state separately its conclusions of law thereon." Appellants here object to the findings of fact and conclusions of law promulgated by the chancellors, claiming they were very brief, general and conclusory in nature. Rule 52(a) does not address the specificity with which findings of fact and conclusions of law must be made. Furthermore, we review chancery

cases *de novo* and the chancellors' findings and conclusions are supported by the record in this case. Accordingly, this point is not well taken.

VII.

APPELLANTS SHOULD BE AWARDED ATTORNEYS' FEES WITH REGARD TO ANY REFUNDS RECEIVED BY MEMBERS OF APPELLANT CLASS

The appellants pursue two theories seeking attorneys' fees. Initially they state that if this court should find that the HUE tax is an illegal exaction and refund taxes collected to members of appellant class, that a portion should be awarded as attorneys' fees. Since we find that the tax is constitutional, this argument need not be addressed.

Appellants next contend that, notwithstanding the decision on the merits, Chancellor Bullion erred in denying them an award of $9,270.42 in attorneys' fees. The chancellor found that refunds were made to the class from taxes erroneously collected pursuant to emergency regulations, before the final regulations were enacted. The final regulations did not include this erroneously collected tax. The judge ruled, however, that there was no common fund from which the attorneys' fees could be paid, and denied the claim. We agree.

In *Powell, Mayor of N.L.R. v. Henry*, 267 Ark. 484, 592 S.W.2d 107 (1980), the appellants sought attorneys' fees from refunds that were made to electrical ratepayers. This court held that attorneys' fees were proper because the refund created a common fund, and stated:

> [T]he action was a class action, which resulted in the recovery of a substantial amount which constituted a common fund. The allowance of attorneys' fees from a common fund established or augmented

> through the efforts of the attorneys to whom the fee is allowed is a well recognized practice and is proper. (citations omitted).

Awards have been made by courts based on the common fund doctrine where the liitigation results in the creation of a common fund against which the fees may be awarded. Annotation, 89 A.L.R.3d 690, 701 (1979).

In finding that the common fund requirement was not met, Chancellor Bullion explained in a letter opinion that:

> Because the Court refused to enjoin the collection of this tax, and refused to require the tax monies to be deposited in an escrow account, all of the tax monies collected under Act 685 have been, and are now being deposited in the State Treasury. There is no impounded fund from which costs and fees that might be allowed for a successful taxpayers action to be drawn.
>
> Monies paid by truckers under the offensive emergency regulation long ago ceased to be paid, and those who paid under its mandates received full refunds long ago. It is probably true that other lawful Act 685 taxes are being received by the State on a daily basis, but this tax money is not related to the offensive emergency regulation, rather are being collected pursuant to the valid exercise of the State's power to tax. In this situation, it is beyond the power of this Court to order state government to pay counsel for the class a fees for services, no matter how deserving it may be.

We do not find the chancellor's finding of fact that no common fund was established to be clearly erroneous. Ark. R. Civ. 52(a). Accordingly we affirm his judgment.

Affirmed.

Purtle, J., not participating.

Hickman, J., dissents.

DARRELL HICKMAN, Associate Justice, dissenting.

This is a test of the Arkansas Highway Department's answer to the claim that our state's highways will be damaged because of the increase of the maximum weight limit on trucks to 90,000 pounds. The legislature's goal was to tax these heavy trucks to make them pay for their share of the damage to our highways. That worthy goal was partly forgotten by the legislators, resulting in a tax which decidedly favors Arkansas-based trucks. Those trucks may do all the damage they want for $175 per year.

The evidence reflected that interstate truckers invariably choose to pay five cents per mile or purchase a trip ticket, rather than pay the annual fee of $175 per truck. That is the only sensible choice for interstate truckers who will not use Arkansas Highways extensively. Arkansas-based truckers just as sensibly choose to pay the $175 per truck every year, because there is no mileage limit with that payment. They can drive thirty thousand miles for considerably less than five cents a mile.

Interstate truckers, not based in Arkansas, are paying 370% more than Arkansas-based truckers for the damage done. That is discrimination that violates the commerce clause of the United States Constitution. Discriminatory, parochial legislation such as this interferes with interstate commerce, an exclusive province of the federal government. *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318 (1977); *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978).

Perhaps most important to us in Arkansas is the fact that the tax as delineated does not make those pay who may do the most damage; our own truckers.

The tax must be fairly related to the services provided, in this case decent highways. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). A mile-weight tax is probably the most fair and sensible answer to the problem: all truckers, Arkansas-based and interstate, pay equally for the damage to the highways. Not only is that sensible, it is unquestionably fair to the people of this state who have to bear any unpaid costs for damage.

I would find the tax violates the commerce clause of the United States Constitution.

APPENDIX H

SUPREME COURT OF ARKANSAS

No. 85-101
85-112

AMERICAN TRUCKING ASS'N, INC., *et al.*,
Appellants,

vs.

HENRY C. GRAY, DIR., ARK.
HIGHWAY & TRANSP. DEP'T, *et al.*,
Appellees,

and

AMERICAN TRUCKING ASS'N, INC., *et al.*,
Appellants,

vs.

CHARLES D. RAGLAND, COMM'R OF
REVENUE, REVENUE DIV., *et al.*,
Appellees.

Appeal from Pulaski Chancery Court,
4th Div., Bruce T. Bullion,
Chancellor, #83-2360

Appeal from Pulaski Chancery Court,
2nd Div., John Earl, Chancellor
#84-374

Supplemental Opinion on Denial of Rehearing
Opinion delivered May 27, 1986

JACK HOLT, JR., Chief Justice. The appellants filed a petition for rehearing contending in part that we erred by failing to address the question of whether the HUE tax violates the privileges and immunities clause of the United States Constitution.

In the opinion, we incorrectly found the appellants lacked standing to raise this argument since all of the named plaintiffs are corporations and the privileges and immunities clause is inapplicable to corporations.

Appellants maintain in their petition that the parties had stipulated that there were two individuals named in the complaint as representative appellants who were so named for the purpose of raising this issue. The respondent states that this is so. Accordingly, we admit error and address this question on its merits.

The privileges and immunities clause provides:

> The Citizens of each State shall be entitled to all Privileges and Immunities in the Several States:

The United States Supreme Court has explained that "[t]he primary purpose of this clause . . . was to help fuse into one Nation a collection of independent, sovereign States. It was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy." *Toomer* v. *Witsell*, 334 U.S. 385, 395 (1948); *see also Paul* v. *Virginia*, 8 Wall. 168 (1868); *Ward* v. *Maryland*, 12 Wall. 418 (1870). In *Ward* v. *Maryland*, the Supreme Court stated:

> Beyond doubt those words are words of very comprehensive meaning, but it will be sufficient to say that the Clause plainly and unmistakably secures and protects the rights of a citizen of one State to pass into any other State of the Union for the purpose of engaging in lawful commerce, trade, or business without molestation . . . and to be exempt from any

higher taxes or excises than are imposed by the State upon its own citizens.

Ward, at p. 430.

The HUE tax does not violate the privileges and immunities clause. We have already held that the tax is facially neutral, applying equally to both Arkansas base-registered trucks as well as to non-Arkansas base-registered vehicles. Further, the Arkansas and non-Arkansas based trucks share the same opportunity of carrying the higher weights. Therefore, there is no classification made between citizens of one state as opposed to citizens of another state.

The second argument by petitioners is that the court was incorrect in finding that the tax did not discriminate against non-Arkansas based trucks. Petitioners cite two Vermont cases which have been decided since the arguments were presented in this appeal. We are obviously not bound by the decisions of a Vermont court. Furthermore, in those cases, the court found that the relevant statutes imposed different requirements on out-of-state operators. Here, the HUE tax applies equally to all operators and any disparity in amounts results from the number of miles traveled by their trucks. The rest of petitioners' argument on this issue and their final contention are essentially restatements of their original brief and thus not proper for rehearing. Sup. Ct. R. 20(g).

Rehearing denied.

PURTLE, J., not participating.

HICKMAN, J., would grant rehearing.

APPENDIX I

SUPREME COURT OF ARKANSAS

No. 83-209

AMERICAN TRUCKING ASSOCIATIONS, INC., TRANSCON LINES, INC., DIAMOND TRANSPORTATION SYSTEM, INC., ROLLINS LEASING CORPORATION, AND COMMERCIAL CARRIERS, INC., ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED TAXPAYERS; ARKANSAS BUS AND TRUCK ASSOCIATION INC., AND JONES TRUCK LINES, INC., ON BEHALF OF THEMSELVES & ALL OTHER SIMILARLY SITUATED TAXPAYERS,

Appellants

VS.

HENRY C. GRAY, DIRECTOR, ARKANSAS HIGHWAY AND TRANSPORTATION DEPARTMENT; DAVID SOLOMAN; RON HERROD; PATSY LEE THOMASSON; RAYMOND PRITCHETT, JR.; BOBBY HOPPER; MEMBERS OF THE ARKANSAS STATE HIGHWAY COMMISSION; ROY L. JOHNSON, CHIEF OF THE ARKANSAS HIGHWAY POLICE DIVISION OF THE ARKANSAS HIGHWAY & TRANSPORTATION DEPARTMENT; CHARLES D. RAGLAND, COMMISSIONER OF REVENUES, REVENUE DIVISION, ARKANSAS DEPARTMENT OF FINANCE & ADMINISTRATION; JIMMIE LOU FISHER, TREASURER OF THE STATE OF ARKANSAS; MAHLON MARTIN, DIRECTOR, ARKANSAS DEPARTMENT OF FINANCE & ADMINISTRATION,

Appellees

Sept. 19, 1983

PURTLE, Justice.

This appeal is from an interlocutory order denying an injunction to prevent monies being collected for the sale of motor fuels from being deposited into the state treasury and from being distributed to various state agencies, cities and towns. Appellants, filed a taxpayers' suit on May 27, 1983, attacking the constitutionality of Act 685 of 1983 claiming it to be an illegal exaction pursuant to Art. 16, sec. 13, of the Arkansas Constitution. The act levied a motor fuel tax upon certain fuels used by the trucking industry. A preliminary injunction was issued on the date suit was filed but was dissolved on July 29, 1983, after several days of testimony. Appellees presented evidence at the hearing on the temporary injunction that they would suffer damages up to $53,000,000 if the injunction were continued. The court set bond in the amount of $53,000,000 in order to stay the dissolution order. The notice of appeal and petition for certiorari was filed with this court on August 1, 1983. Subsequently, we granted appellants' motion to expedite the appeal. The decree of the chancellor is affirmed and the petition for certiorari is denied pending trial of the case on its merits.

At the hearing on the temporary injunction the chancellor found appellants' chances of prevailing on the merits of the case were not good. An order was issued dissolving the temporary injunction. The interlocutory order is an appealable order pursuant ot Arkansas Rules of Appellate Procedure, Rule 2(a)6.

Appellants claim that certain findings made by the chancellor were not valid in light of the evidence presented. Disputed findings by a chancellor are upheld on appeal, unless such findings are clearly erroneous. *Gray v. Ragland*, 277 Ark. 232, 640 S.W.2d 788 (1982). Many citations were presented to the chancellor and he was obviously persuaded that the highway use equalization tax imposed by Act 685 of 1983 would likely stand against

attack. In view of the presumption of validity of acts of the Arkansas General Assembly we cannot say the findings of the court below were clearly erroneous. *Arkansas Motor Vehicle Commission v. Cliff Peck Chevrolet, Inc.*, 277 Ark. 185, 640 S.W.2d 453 (1982).

The granting or denying of a temporary restraining order is a matter falling within the sound discretion of the trial court and its decision will not be reversed on appeal unless it is clearly erroneous. *Kreutzer v. Clark*, 271 Ark. 243, 607 S.W.2d 670 (1980).

Appellants correctly contend that irreparable harm must be shown before a restraining order or injunction will issue. The chancellor in this case did not find that irreparable harm would result to appellants. Therefore, an essential ingredient for continuing the temporary injunction is missing. ARCP, Rule 65. *Kreutzer v. Clark, supra.* We do not consider the merits of the case on this appeal. We are convinced that the record supports the chancellor's ruling. The case is scheduled to be heard on its merits before the end of the current month, and should a proper appeal be lodged after the final decision, we will at that time deal with the merits of the case as presented to us. On the present appeal, the decision of the chancellor is affirmed.

HAYS, J., not participating.